United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT JAMES E. LOWERY

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21, 172 and 21, 201

Frederick L. Salzman and James E. Lowery, Appellants,

v.

United States of America, Appellee.

APPEAL FROM JUDGEMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Franklin M. Schultz
Robert M. Kennan, Jr.
888-17th Street, N.W.
Washington, D.C. 20006
Attorneys for Appellant
(Appointed by this Court)

Of Counsel:

Purcell & Nelson
888-17th Street, N.W.
Washington, D.C. 20006

STATEMENT OF QUESTIONS PRESENTED

1. Was it prejudicial error for the prosecutor to include in his summation to the jury statements of fact and conclusions concerning Appellant's actions and state of mind shortly after the crime which were not supported by the evidence?

2. Was it prejudicial error for the trial judge, in response to the jury's questions during their deliberations, to permit hearsay and unidentified testimony to be repeated, and not to give supplementary instructions as to the jury's duty to consider all the evidence in determining the facts?

INDEX

TABLE OF CASES

---

*Cases chiefly relied upon are marked by asterisks.

MISCELLANEOUS

---

*Cases chiefly relied upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant James E. Lowery ("Lowery") was indicted under a one count indictment for robbery, D. C. Code § 22-2901 (1967). After pleading not guilty, Lowery was tried before a jury in the United States District Court for the District of Columbia, convicted, and sentenced to serve twenty months to five years imprisonment. The District Court had jurisdiction pursuant to D. C. Code § 11-521 (1967). Lowery filed a timely Notice of Appeal.

This Court has jurisdiction pursuant to the Act of June 25, 1948, ch. 646, 62 Stat. 929, 930, as amended, U.S.C.A, Title 28, §§ 1291, 1294 (1964). By order dated August 1, 1967, Lowery's appeal was consolidated with the appeal of Frederick Salzman ("Salzman"), No. 21,172.

STATEMENT OF THE CASE AS TO LOWERY

The only testimony against Lowery was given by James Walker, the complaining witness. Lowery did not testify. Pertinent testimony of Detectives Harold R. Muns and Joseph P. Butler, both of the United States Park Police, is also summarized below.

James Walker ("Walker") testified that "around 3:00 or 4:00 o'clock" on the afternoon of August 15, 1966, he left New York City by Trailways bus for Virginia Beach, Virginia (Tr. 8). He arrived at the Trailways terminal in

Washington at "roughly a quarter to twelve," and he had "around four hours layover" (Tr. 8, 9, 63).* After checking his luggage, he walked to the corner of 14th and K Streets, entered the northwest corner of Franklin Park, and stopped at a drinking fountain (Tr. 9-10).

A man approached Walker, asked for a cigarette, and engaged him in conversation (Tr. 10-A, 13). They sat down on a park bench, with Walker at the end (Tr. 13). A second man then appeared and joined in the conversation, standing on Walker's right, next to the end of the bench (Tr. 13). After "five to ten minutes or so," the second man broke a wine bottle on the end of the park bench, held the broken bottle to Walker's throat, and demanded his money (Tr. 13, 15). After removing the money from Walker's wallet, the man who had first approached him demanded and took Walker's rings and watch (Tr. 15). The second man then warned Walker not to "make a move before we get out of here," and both men walked away through the park (Tr. 18, 19).

Walker testified that the second man "had on a white short-sleeved shirt with a blue band around the collar and black pants" (Tr. 14).

---

*Pursuant to a subpoena, Mr. Ferris O. Garrett, assistant to the President of Safeway Trails, Inc., produced and testified as to the contents of two dispatch books showing departure and arrival times for Trailways buses leaving New York for Washington on August 15, 1966. A table summarizing Mr. Garrett's testimony (Tr. 190-200) is attached hereto as Appendix A.

Walker returned to the Tailways terminal and told a special officer what had happened (Tr. 21, 22). When the officer said he could not help him, Walker went across the street to the Greyhound terminal and waited "roughly twenty minutes" until two Metropolitan policemen arrived (Tr. 23). After telling the two policemen what had happened, Walker accompanied the two policemen to Franklin Park (Tr. 24). There he met two detectives and together they looked through the park for "about twenty minutes or so" (Tr. 24).

Walker then met Park Police Detective Harold R. Muns ("Muns"). They searched "for maybe more than an hour or so" before responding to a radio call that suspects were being held for identification (Tr. 25-26). Walker tentatively identified Salzman, one of the suspects in the back of a police car, as one of the men who had robbed him. He then accompanied Muns to police headquarters "around 4:00 o'clock, I would say, or maybe 5:00" (Tr. 27). Later Walker returned to Franklin Park with Muns, and Muns took a broken wine bottle from a trash receptacle near the spot where the robbery had taken place (Tr. 29-30).

Questioning Walker about his identification of Salzman, the prosecutor asked, "This was early on the 16th when your

money was taken from you about 1:00 A.M.?" Walker replied, "Somewhere in that area" (Tr. 29). Walker could not remember when he met Muns (Tr. 45), but he stated on cross-examination that it was "somewheres around 3:00 o'clock" when he went with Muns to Franklin Park for the bottle and that "it was roughly two hours from the time I was robbed to the time that the bottle was picked up" (Tr. 46).

Detective Muns testified that he met Walker shortly after 2:00 A.M. on August 16, 1966 at Franklin Park, after which they "spent a considerable amount of time cruising the downtown area" (Tr. 111, 112). They responded to a radio call at approximately 4:30 A.M., and Walker tentatively identified Salzman as one of the men who had robbed him (Tr. 114, 115). Muns stated that he lifted fingerprints from the bottle taken from a trash can in the park at 5:30 A.M. (Tr. 123).

Park Police Detective Joseph P. Butler ("Butler") testified that he first saw Lowery at approximately 2:00 A.M. on August 16, 1966 in the emergency room of George Washington University Hospital (Tr. 84, 85). Lowery was on a stretcher, bleeding from two three-inch lacerations in the back left side of his neck (Tr. 85). He was "stripped to the waist . . . and had a pair of dark trousers on. . . ." (Tr. 85). Butler

also observed "a shirt that was saturated with blood . . . a polo type shirt with a blue trimming . . . around the neck like a crew type shirt" (Tr. 85-86). Lowery told Butler that "while sitting in the inner circle [in the southeast corner of Franklin Park] he was approached from behind by three negro males who attacked him and removed $3.00 from his right front pocket. . . . [H]e stated that he scuffled with them and he was cut about the neck and on the left ear. . . ." (Tr. 86).

After returning with Muns to headquarters for the second time, Walker met Butler and another detective (Tr. 30). Together they went to a room occupied by Lowery in the D. C. Annex Hotel (Tr. 31). While the two detectives entered the room and talked to Lowery for "about three or four minutes," Walker watched from the door (Tr. 32). Lowery was in his underclothes when the detectives entered, then put on his trousers (Tr. 33, 90, 94). He sat on the edge of his bed while talking to the detectives, with his left side to the door, and he had a big white bandage on the left side of his neck (Tr. 33-34, 82, 94-95). As they left the hotel, Walker told the detectives he was positive that Lowery was the man who held the bottle (Tr. 33). When asked by the prosecutor on redirect why he was positive of his identification of Lowery, Walker replied, "Well, he was the

man that was holding the bottle to my throat. I was constantly staring right in his eyes, and right at the bottle,and that is a face that I won't never forget" (Tr. 71).

Detective Butler was asked by the prosecutor whether Lowery had been questioned in his hotel room about his shirt. Butler stated (Tr. 90-91):

> Yes. That was the one question that we wanted answered. We asked him where was his shirt and he stated that he left it at the hospital, and to the best of my recollection, and I am not sure of this, he left in a hospital gown, just upper part, and he had stopped at a hotel located in the 900 block of K--of New York Avenue, where a friend gave him another shirt, and he didn't have the shirt with him in the room, and he said that he left it at the hospital. We checked the hospital later that morning and it wasn't there. We couldn't find the shirt that he had when he was originally cut.

At a bench conference after the second day of the trial, the prosecutor indicated that he was considering a request for an instruction with respect to concealment of evidence as evidencing Lowery's "guilty conscience at the time of that investigation" (Tr. 184). Lowery's counsel stated that he objected "to what [the prosecutor] suggested as to Lowery" (Tr. 184). Before making his closing argument, the prosecutor formally requested such an instruction, (Tr.201). The Court denied this request, stating, "You may argue it but there will be no specific instruction" (Tr. 202).

In his summation with respect to Lowery, the prosecutor said (Tr. 214-15, 216-17):

> Let's go a little further as to the defendant Lowery. In addition to Mr. Walker saying that he looked at him primarily and knows him because Lowery was the one holding the bottle to his neck, he told you what Lowery was wearing, and that was a white polo shirt, as I recall, with some sort of blue trim around the neck, and if you recall, ladies and gentlemen, about 2:00 a.m. in the morning get a very strange call. They find a man was cut at the hospital, and he is at George Washington and Detective Butler with his partner goes over to George Washington Hospital and they find a man with his shirt off lying on a table being treated for a cut somewhere behind the left ear.
>
> They look at this shirt, although they know nothing about the Walker case, and Detective Butler recalls what that shirt was like. He told you that it was a white shirt and it had blue trim on the collar, and he didn't have any reason to take anything--he didn't have any reason to take specific note of it then, but he did know that it was blood-soaked at the time. There was no question that Mr. Lowery had been cut up. . . .
>
> What further evidence is there against the defendant Lowery? He is positively identified and you must remember the circumstances that Mr. Walker was in and the reason he would remember the face of a man that held that bottle. He was wearing a white shirt with blue trim and it is seen by detectives, and he has given a story which the detectives find suspicious, if not incredible, therefore, they take Walker and, ladies and gentlemen, what happened to that shirt?

> Somewhere between the hospital and the D. C. Hotel, where the police found Mr. Lowery, Mr. Lowery disposed of that shirt. Why? Well, that is the type of thing that probably would be more easily remembered than even the face, and that was not found. Mr. Lowery says he lost the shirt. That shirt could be used to identify him. Mr. Lowery attempted to conceal that shirt. That is guilty knowledge. That shirt disappeared. Why would a man's shirt disappear?

No objection was made.

The jury retired at 12:57 p.m. At 3:52 p.m., a note was received by the trial judge. The note, which is in the District Court jacket, stated:

1. The time of the Robbery of James Lowery in the park.

2. The time that James Lowery was ~~treated~~ admitted [sic] at the hospital.

3. The time of the robbery of Walker.

At a bench conference counsel could not agree as to the testimony relating to the questions, but agreed with the Court's suggestion that "the jury should have these times if available in the transcript." (Tr. 249) It was also agreed that the court reporter would "check the times in the transcript if the times are available, we will instruct the jury at 9:45 tomorrow morning on those times." (Tr. 249-50.) The jury was then dismissed until the following morning.

The next morning, out of the presence of the jury, the court reporter read, as to the first question (the time of the robbery of James Lowery in the park), the following testimony by Detective Butler (appearing in the transcript at page 88) (Tr. 253):

> Question: What did you and your partner, Detective Henninger, do after taking this report from Mr. Lowery?
>
> Answer: We went back to Franklin Park and looked it over and we responded to Headquarters, our Headquarters, and we discussed this matter with Detective Harold R. Mums, [sic] and he had a similar type case that occurred in the park at the same time, approximately 1:00 a.m., and in talking to him he gave us a description of the two in his particular case.

Lowery's counsel objected to this testimony being repeated to the jury because it was hearsay. The Court overruled the objection and summoned the jury. He stated (Tr. 255):

> Mr. Foreman, ladies and gentlemen, yesterday, as you will recall, you requested the answers to three questions. Miss Copeland, the Reporter, has reviewed the transcript, or reviewed her notes, and she will read the answers to the questions that you asked for.

As to the first question, the court reporter read the question and answer quoted above. She then said (Tr. 255):

> Question 2: "The time that James Lowery was admitted at the hospital." There was no testimony with reference to that.

Question 3: "The time of the robbery of Walker." The answer to that was: "About 1:00 a.m."

No objection was made. The jury retired. After deliberating for thirty-five minutes, it returned a guilty verdict as to both defendants.

RULES INVOLVED

Federal Rules of Criminal Procedure.

Rule 51. Exceptions Unnecessary.

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52(b). Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. Appellant's conviction should be reversed because the prosecutor included in his summation to the jury misstatements of fact, and unfounded conclusions concerning Appellant's actions and state of mind shortly after the crime, which prejudiced Appellant in the eyes of the jury.

2. Because Appellant was prejudiced when the trial judge, in response to questions from the jury during their deliberations, permitted hearsay and unidentified testimony to be repeated without giving supplementary instructions as to the jury's duty to determine the facts from all the evidence, Appellant's conviction should be reversed.

SUMMARY OF ARGUMENT

In his summation to the jury the prosecutor attempted to buttress the complaining witness' identification of Lowery as one of two men who had robbed him by making it appear that the complaining witness' description of a shirt worn by one of the two men corresponded with a detective's description of a shirt seen when he interviewed Lowery in a hospital on the night of the robbery. There was no evidentiary basis for the prosecutor's statements. Nor was there any evidence to support the prosecutor's conclusions that Lowery had attempted to conceal his shirt after leaving the hospital and that such action showed Lowery's "guilty knowledge." Because the prosecutor's misstatements of fact and unfounded conclusions prejudiced Lowery, his conviction must be reversed. King v. United States, 372 F.2d 383, 394 (D.C. Cir. 1967); Corley v. United States, 124 U.S.App. D.C. 352, 365 F.2d 884 (1966); Reichert v. United States, 123 U.S.App.D.C. 294, 359 F.2d 278 (1966); Johnson v. United

States, 121 U.S.App.D.C. 19, 347 F.2d 803 (1965); Jones v. United States, 119 U.S.App.D.C. 213, 338 F.2d 553 (1964); Lee Won Sing v. United States, 94 U.S.App.D.C. 310, 215 F.2d 680 (1954).

After almost three hours the jury interrupted their deliberations to ask specific questions concerning the time certain events took place on the night of the robbery. The trial judge, in response to such questions, permitted hearsay testimony to be repeated to the jury and permitted the court reporter to read, without identifying the speaker, a portion of a leading question posed by the prosecutor. Moreover, the trial judge neglected to remind the jury that the answers given to their questions were evidence, to be considered together with other evidence in the case, in determining the facts concerning Lowery's guilt or innocence. These deficiencies, separately and in the aggregate, prejudiced Lowery by placing him at the scene of the crime at or near the time it was committed and by leading the jury to believe that the times contained in the answers given were not evidence, but facts upon which they should rely in reaching their verdict. See United States v. Jackson, 257 F.2d 41, 43 (3d Cir. 1958); Henry v. United States, 204 F.2d 817, 820 (6th Cir. 1953); Billeci v. United States, 87 U.S. App.D.C. 274, 283, 184 F.2d 394, 403 (1950).

ARGUMENT

I. It was prejudicial error for the prosecutor to include in his summation to the jury misstatements of fact and conclusions not supported by evidence produced at the trial.

The case against Lowery rested solely upon the identification by Walker, the complaining witness. But the prosecutor attempted to reinforce Walker's identification by linking his description of a shirt worn by the man who threatened him with Detective Butler's description of a shirt seen in the emergency room of George Washington University Hospital.

Walker stated that the man who threatened him with a broken bottle wore "a white short-sleeved shirt with a blue band around the collar" (Tr. 14). Butler testified that, when he first saw Lowery in the hospital emergency room, he observed, beneath a table, "a shirt that was saturated with blood . . . a polo type shirt with a blue trimming . . . around the neck like a crew type shirt" (Tr. 85-86). Butler later questioned Lowery about the shirt when they were in Lowery's hotel room. Lowery stated "that he left it at the hospital. . . . We checked the hospital later that morning and it wasn't there" (Tr. 90).

At a bench conference at the close of the second day of trial, the prosecutor first indicated that he would

request an instruction with respect to the "disappearance" of Lowery's shirt as an "attempt to suppress evidence in this case," showing that Lowery had a "guilty conscience" at the time of the investigation (Tr. 184). Although the Court did not rule at that time, Lowery's counsel stated that he objected "to what [the prosecutor] suggested as to Lowery" (Tr. 184). The Court later specifically denied the prosecutor's request to give a standard jury instruction regarding concealment as evidence of a defendant's consciousness of guilt, stating, "You may argue it but there will be no specific instruction" (Tr. 202). No objection was made to this ruling.

The prosecutor did argue it. He devoted a substantial portion of his summation concerning Lowery to the "disappearance" of Lowery's shirt as reinforcing Walker's identification and evidencing consciousness of guilt on Lowery's part:

> Let's go a little further as to the defendant Lowery. In addition to Mr. Walker saying that he looked at him primarily and knows him because Lowery was the one holding the bottle to his neck, he told you what Lowery was wearing, and that was a white polo shirt, as I recall, with some sort of blue trim around the neck, and if you recall, ladies and gentlemen, about 2:00 a.m. in the morning get a very strange call. They find a man was cut at the hospital, and he is at George Washington and Detective Butler

with his partner goes over to George Washington Hospital and they find a man with his shirt off lying on a table being treated for a cut somewhere behind the left ear.

They look at this shirt, although they know nothing about the Walker case, and Detective Butler recalls what that shirt was like. He told you that it was a white shirt and it had blue trim on the collar, and he didn't have any reason to take anything--he didn't have any reason to take specific note of it then, but he did know that it was blood-soaked at the time. There was no question that Mr. Lowery had been cut up (Tr. 214-215, emphasis added.)

What further evidence is there against the defendant Lowery? He is positively identified and you must remember the circumstances that Mr. Walker was in and the reason he would remember the face of a man that held that bottle. He was wearing a white shirt with blue trim and it is seen by detectives, and he has given a story which the detectives find suspicious, if not incredible, therefore, they take Walker and, ladies and gentlemen, what happened to that shirt?

Somewhere between the hospital and the D. C. Hotel, where the police found Mr. Lowery, Mr. Lowery disposed of that shirt. Why? Well, that is the type of thing that probably would be more easily remembered than even the face, and that was not found. Mr. Lowery says he lost the shirt. That shirt could be used to identify him. Mr. Lowery attempted to conceal that shirt. That is guilty knowledge. That shirt disappeared. Why would a man's shirt disappear? (Tr. 216-217, emphasis added.)

No objection was made to these remarks.

A. The prosecutor's statements to the jury about the shirts seen by Walker and Butler and his conclusions concerning Lowery's related actions and state of mind were not supported by evidence.

Contrary to the prosecutor's statement to the jury, Walker described the shirt worn by the man who held a bottle to his throat as a "white short-sleeved shirt with a blue band around the collar" (Tr. 14), rather than "a white polo shirt" with blue trim "around the neck" (Tr. 214). Butler, on the other hand, did not describe the shirt he observed in the emergency room as "a white shirt" (Tr. 215, 216). In fact, Butler did not identify the color of the shirt in the emergency room, nor did he describe blue trim as being "on the collar" (Tr. 215), but rather "around the neck" (Tr. 86). Further, Butler did not describe the shirt he saw as having a collar (Tr. 85-86). In light of the discrepancy between Walker's and Butler's descriptions there was no basis for the prosecutor's assertion that the "white shirt with blue trim" seen by Walker was also "seen by detectives." (Tr. 216).

There is not one shred of evidence to support the prosecutor's statement that Lowery disposed of his shirt somewhere between the hospital and his hotel. Lowery did not tell Butler that he "lost his shirt" (Tr. 217), but rather that "he left it at the hospital" (Tr. 90). Nothing in the record suggests that Lowery "attempted to conceal that shirt" (Tr. 217). To the contrary, the shirt was in plain view of

Detective Butler in the hospital emergency room. The prosecutor's conclusion, "That is guilty knowledge" (Tr. 217), therefore lacked any evidentiary basis whatsoever.

B. The prosecutor's misstatements of fact and unfounded conclusions prejudiced Lowery in the eyes of the jury.

In Berger v. United States, 295 U.S. 78, 88 (1935), the Supreme Court announced the classic statement of the prosecutor's duty:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will

> be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger's high standards have consistently been applied by this Court. Most recently, in King v. United States, 372 F.2d 383 (D.C. Cir. 1967), this Court found error in a prosecutor's attempts, during cross-examination and summation, to discredit a defendant's insanity defense to a charge of second degree murder. Two St. Elizabeth's psychiatrists had agreed that defendant suffered from a "personality disorder . . . with organic and alcoholic features severe enough to be classified as a mental illness." (372 F.2d at 384). One psychiatrist testified that the crime was "probably" the product of the mental disease, while the other testified that the crime was "possibly" its product. The psychiatric testimony concerning the nature of defendant's illness and its relation to the crime made organic brain damage a significant subject at the trial.

This Court found that the prosecutor, during the trial, "persistently drummed into the jury - without evidentiary basis, and contrary to the uncontradicted testimony

of the Government psychiatrists called by the defense the assertion that organic damage was negatived by the failure to detect it by physical tests, and that psychological tests could not establish organic damage" (372 F.2d at 390). The prosecutor also repeatedly asserted that one of the psychiatrists "testified he had found no organic damage, plainly contrary to the actual testimony given." (372 F.2d at 394). Reversing defendant's conviction for manslaughter, Judge Leventhal for this Court held: "It is elementary that a prosecutor may not import his own testimony into a criminal trial. . . . It is misconduct for a prosecutor to make an assertion to the jury of a fact, put in the form of an assumption of a question, unless the prosecutor proffers direct testimony of that fact. The same principle applies to a matter of opinion. . . ." (372 F.2d at 394)

This Court's rule is clear: If a prosecutor makes to the jury misstatements of fact or conclusions which have no foundation in the evidence, and the defendant is prejudiced thereby, the defendant's conviction must be reversed. Corley v. United States, 124 U.S.App.D.C. 351, 365 F.2d 884 (1966); Reichert v. United States, 123 U.S.App.D.C. 294, 359 F.2d 278 (1966); Johnson v. United States, 121 U.S.App. D.C. 19, 347 F.2d 803

(1965); Jones v. United States, 119 U.S.App.D.C. 213, 338 F.2d 553 (1964); Lee Won Sing v. United States, 94 U.S.App.D.C. 310, 215 F.2d 680 (1954); see United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958); 6 J. Wigmore, Evidence, §§ 1806-07 at 259, 263-66 (1940).

There can be no doubt that Lowery was prejudiced. The case against him was based entirely on the memory of the complaining witness. Walker testified on redirect that he "won't never forget" the face of the man who held the broken bottle to his throat (Tr. 71). But it was after he spent a sleepless night that Walker first identified Lowery, observing him in profile from the door of a hotel room, when Lowery's neck was partially covered with a large bandage (Tr. 33-34, 94-95). This might well have raised doubts in the jurors' minds. The fact that the jury interrupted their deliberations after nearly three hours to ask three specific questions concerning Lowery's whereabouts at the time Walker was robbed (Tr. 248) strongly suggests that the jurors were not prepared to find Lowery guilty on the basis of Walker's memory alone.

The prosecutor himself realized that there was room to doubt Walker's identification of Lowery, for he placed at least as much emphasis in his summation on the descriptions of a shirt as on Walker's memory of Lowery's face:

"Mr. Lowery disposed of that shirt. Why? Well that is the type of thing that probably would be more easily remembered than even the face. . . ." (Tr. 217, emphasis added). In these circumstances, the prosecutor's erroneous summary of testimony describing the shirts, his assertion that Lowery attempted to conceal his shirt, and his conclusion that this constituted guilty knowledge" were unmistakably prejudicial.

The Court gave the customary instruction to the jury to rely on their own recollection of the evidence and not counsel's summary (Tr. 233-34). But this was not sufficient to offset the emphasis given the misstatements and unfounded conclusions by the prosecutor. King v. United States, 372 F.2d 383, 396 (D.C. Cir. 1967); Lee Won Sing v. United States, 94 U.S.App.D.C. 319, 311, 215 F.2d 680, 681 (1954). The prosecutor's misconduct is not excused because it may have "reflected his zeal and the excitement of the trial rather than any deliberate attempt to impose upon the jury." King v. United States, 372 F.2d at 390 (1967). Here, as in King, "the prosecutor stepped out of bounds [and] the impact of this plain error, in the context of a close case, was probably so prejudicial" that reversal is required so that a new trial may be conducted free of similar error. 372 F.2d at 390.

II. It was prejudicial error for the trial judge, in response to the jury's questions, to permit hearsay and unidentified testimony to be repeated, and not to give supplementary instructions as to the jury's duty to determine the facts from all the evidence.

When a jury interrupts its deliberations to ask specific questions or to request that certain testimony be repeated, the trial judge, in his discretion, may deny or respond to the request. E.g., United States v. Jackson, 257 F.2d 41, 43 (3rd Cir. 1958); Henry v. United States, 204 F.2d 817, 820 (6th Cir. 1953); see Corley v. United States, 124 U.S.App.D.C. 351, 352, 365 F.2d 884, 887 (1966) (Burger, J., dissenting) (dictum); Annot. 50 A.L.R.2d 176, 180 (1956). Unless restraint is exercised in responding to such requests, undue emphasis may be given the evidence repeated at that point in the trial. Henry v. United States, 204 F.2d 817, 820 (6th Cir. 1953); see Corley v. United States, 124 U.S.App.D.C. 351, 352, 365 F.2d 884, 887 (1966) (Burger, J., dissenting) (dictum). It is therefore incumbent upon the trial judge to use extreme caution when he permits testimony to be restated or reread to the jurors. In the present case, Lowery was prejudiced because caution was not exercised.

A. The testimony repeated to the jury prejudiced Lowery by placing him at the scene of the crime at the time it was committed.

The complaining witness' recollection of the time of events on the night he was robbed was vague and contradicted. Walker testified that he left New York City "around 3:00 or 4:00 o'clock" (Tr. 8) and arrived in Washington at "roughly a quarter to twelve" (Tr. 8, 9, 63). Yet bus schedules from the dispatch books read into evidence showed that the Trailways buses leaving New York for Washington between 3:00 and 4:00 P.M. arrived no later than 9:15 and that the only Trailways buses arriving in Washington after 11:22 P M. left New York at 7:30.* Walker also testified that it was "somewheres around 3:00, roughly two hours from the time I was robbed" when he accompanied Detective Muns to look for fragments of the bottle in Franklin Park (Tr. 46). Muns, on the other hand, testified that he lifted fingerprints from the bottle, shortly after returning with Walker from the park, at 5:30 A.M. (Tr. 120, 123). In fact, Walker did not specify the time of the robbery. When asked, "This was early on the 16th when

---

* See Appendix A.

your money was taken from you about 1:00 a.m.," Walker replied, "Somewhere in that area" (Tr. 29).

It is not surprising that the jurors were confused about the chronology of events. If it appeared that Lowery, who admitted being in Franklin Park when he was attacked, had been attacked after Walker was robbed, that fact would tend to corroborate Walker's identification of Lowery. If, on the other hand, it appeared that Lowery had been attacked before Walker was robbed, that fact would have provided an alibi for Lowery. The jury's questions were intended to ascertain the facts. In these circumstances, the response to the jury's questions concerning the time Lowery was robbed, the time he was admitted to the hospital, and the time Walker was robbed, could have determined the outcome of the jury's deliberations concerning Lowery.

With respect to the first question, the time of the robbery of Lowery, the court reporter was permitted to reread hearsay testimony of Decective Butler concerning a conversation with Detective Muns.* Butler testified

---

* The court reporter misread the first question as "the time of the robbery by James Lowery in the park," rather than "the time of the robbery of James Lowery in the park." (Tr. 253, 255.)

that after he left the hospital," [W]e discussed this matter with Detective Harold R. Muns, and he had a similar type case that occurred in the park at the same time, approximately 1:00 a.m. . . ." (Tr. 88). Defense counsel's objection to repetition of this testimony was overruled.

Butler was not testifying as to facts on the basis of his personal experience, but rather as to a discussion with Detective Muns in which Muns informed him of a similar case at approximately 1:00 a.m. Such testimony constitutes inadmissible "evidence of statements made by persons other than the witness, introduced in order to establish the truth of the statements." Kelley v. United States, 99 U.S. App. D.C. 13, 15, 236 F.2d 746, 748 (1956). Even though no objection had been made previously, the hearsay testimony should not have been repeated at this critical point in the trial. Defense counsel's objection should have been sustained.

The "answer" given by the court reporter to the third question, the time of the robbery of Walker, was "about 1:00 a.m." (Tr. 258). The speaker was not

identified, but it appears that the "answer" was taken from a leading question put to Walker by the prosecutor (Tr. 29):

> Q. This was early on the 16th when your money was taken from you about 1:00 a.m.
>
> A. Somewhere in that area.

Although the words "about 1:00 a.m." were those of the prosecutor, and not evidence in the case, the jury could, and probably did, regard them as evidence. Moreover, the prosecutor's question containing the words "about 1:00 a.m." was not the only testimony in the record concerning the time of Walker's robbery. Walker testified that he left New York "around 3:00 or 4:00 o'clock," arrived in Washington at "roughly a quarter to twelve," checked his bags, and walked from the Trailways Depot to the northwest corner of Franklin Park (Tr. 8-10). But, as we have seen, his recollection of his departure and arrival time was contradicted by the bus schedules in the dispatch books.

The jury in effect requested, and was entitled to, all the relevant testimony concerning the time of Walker's robbery, including the bus schedules and Walker's account of his actions after arriving in Washington. The Court failed to supply that testimony.

Taken together, the "answers" given the jury's questions by the court reporter made it appear that Lowery had been in Franklin Park at "approximately 1:00 a.m.," and Walker had been robbed at "about 1:00 a.m." The record does not establish the accuracy of either time with any degree of assurance. If Detective Butler's hearsay testimony had not been read again, or if a portion of the prosecutor's leading question had not been repeated out of context, the jury might well have concluded that the gap in the testimony concerning time made it impossible to ascertain whether Walker had been robbed before--or after--Lowery was attacked, and that the case against Lowery had therefore not been proved beyond a reasonable doubt. See People v. Henderson, 4 Cal.2d 188, 48 P.2d 17, 20 (1935).

B. The trial judge's failure to remind the jury that it was their duty to determine facts from the evidence prejudiced Lowery.

In Quercia v. United States, 289 U.S. 468, 469, 470 (1933), Mr. Chief Justice Hughes observed:

> In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and

> of determining questions of law. . . . It is within his province . . . to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. . . . The influence of the trial judge "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." (Emphasis added.)

See Young v. United States, 120 U.S.App.D.C. 312, 315-16, 346 F.2d 793, 796-97 (1965) (concurring opinion); Hardy v. United States, 118 U.S.App.D.C. 253, 255, 335 F.2d 288, 290 (1964) (per curiam); Billeci v. United States, 87 U.S.App.D.C. 274, 283, 184 F.2d 394, 403 (1950). In responding to the jury's questions in the present case, the trial judge failed to make "it clear to the jury that all matters of fact [were] submitted for their determination." Quercia v. United States, supra.

As we have seen, the jury's note contained three questions which required factual answers concerning time. When the jury had assembled, the judge stated: "[Y]esterday, as you recall, you requested the answers to three

questions. Miss Copeland, the Reporter, has reviewed the transcript, or reviewed her notes, and she will read the answers to the questions that you asked for" (Tr. 255, emphasis added). The reporter read the first question and "the answer to that question . . ." (Tr. 255). She then said (Tr. 255):

> Question 2: "the time that James Lowery was admitted at the hospital." There was no testimony with reference to that.
>
> Question 3: "The time of the robbery of Walker." The answer to that was: "About 1:00 a.m."

The judge stated, "All right, ladies and gentlemen, you may resume your deliberations" (Tr. 255-56). Thirty-five minutes later, the jury returned guilty verdicts as to both defendants.

As we have seen, the "answer" to the first question, the time of the robbery of Lowery, was hearsay testimony and the "answer" to the third question, the time of the robbery of Walker, was taken from a leading question by the prosecutor. Lowery's counsel had objected to rereading Butler's hearsay testimony to the jury, and he was given no opportunity out of the jury's presence to object to, or inquire about the source of, the "answer" given

in response to the third question. With respect to the third question, the judge relied entirely on the court reporter's review of her notes. He should have inquired about the source of the answer, instructed the jury that the words "about 1:00 a.m." were taken from a question put by the prosecutor, and supplied the jury with Walker's answer, as well as other relevant testimony concerning the time of Walker's robbery.

The manner in which the judge did respond to the jury's questions left the jury with the impression that the "answers" to their questions were specific facts upon which they could rely, rather than evidence from which, together with other relevant evidence, they were obliged to determine the facts.

At the beginning of his charge, the trial judge instructed the jury that they were "the sole judges of the facts" (Tr. 233) and that "Nothing that . . . I may say in commenting on the evidence, if I should do so, shall be binding on you in reaching your decision on the question of fact" (Tr. 234). But in responding to a jury's questions which require specific facts as answers, as in expressing an opinion on phases of the evidence, the judge "is treading close to the line which divides proper

judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt; references in some remote or obscure portion of a long charge will not suffice for the purpose." Billeci v. United States, 87 U.S.App.D.C. 274, 283, 184 F.2d 394, 403 (1950).

In this case, the trial judge's failure to remind the jury that the "answers" were evidence, and that it was their duty to determine the facts from all the evidence, could have led the jury to assume that the times included in the "answers" were facts beyond their province to question, and that, on the basis of such facts, they were entitled to find Lowery guilty.

CONCLUSION

For the reasons set forth above, this Court should reverse the Judgment of Conviction of the District Court.

Respectfully submitted,

Of Counsel:

Purcell & Nelson
888 - 17th Street, N. W.
Washington, D. C. 20006

Franklin M. Schultz
Robert M. Kennan, Jr.
888 - 17th Street, N. W.
Washington, D. C. 20006
Attorneys for Appellant
(Appointed by this Court)

November 10, 1967

APPENDIX A

The following table summarizes the testimony of Mr. Ferris O. Garrett concerning departure and arrival times for Trailways buses leaving New York for Washington on August 15, 1966 (Tr. 190-200):

Scheduled buses

Coach No.	Schedule No.	Departure	Arrival	Tr. Reference
693	-	3:30 P.M.	7:50 P.M.	192
431	1649	3:30 P.M.	8:00 P.M.	192
-	1633	4:00 P.M.	8:50 P.M.	192
519	4605	4:30 P.M.	8:40 P.M.	192
296	1651	4:30 P.M.	9:05 P.M.	193
515	4651	5:00 P.M.	10:20 P.M.	193
208	635	5:30 P.M.	9:40 P.M.	193
242	1635	5:30 P.M.	11:22 P.M.	193, 198, 200
660	1653	6:30 P.M.	11:05 P.M.	198
507	1639	7:00 P.M.	11:28 P.M.	199
707	639	7:30 P.M.	11:40 P.M.	199

Extra sections

Coach No.	Schedule No.	Departure	Arrival	Tr. Reference
-	631	3:30 P.M.	7:45 P.M.	193
706	1649	3:45 P.M.	9:15 P.M.	194, 195
620	631	4:30 P.M.	7:50 P.M.	194
690	-	4:40 P.M.	8:30 P.M.	194
576	-	5:10 P.M.	10:00 P.M.	194
663	-	5:30 P.M.	9:35 P.M.	194
629	841		12:05 A.M.	197-98, 200(?)
645	639	7:30 P.M.	11:30 P.M.	199

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,172

FREDERICK L. SALZMAN, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the Judgment of
The United States District Court
for the District of Columbia

E. Riley Casey
Stephen F. Owen, Jr.
Counihan, Casey & Loomis
1000 Connecticut Avenue
Washington, D.C. 20036
Counsel for Appellant
(Appointed by This Court)

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether the trial Judge, in his instructions to the jury, should have distinguished between voluntary and involuntary alcoholism where the Appellant had been adjudged a chronic alcoholic?

2. Should the trial Judge have instructed the jury that if they found defendant's act to be a product of his disease, chronic alcoholism, that he therefore could not have the necessary specific intent to steal and could not be found guilty of robbery?

I N D E X

AUTHORITIES CITED

TABLE OF CASES

AUTHORITIES CITED (Continued)

STATUTES

OTHER REFERENCES

---

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,172

FREDERICK L. SALZMAN, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal of a conviction of robbery in the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Frederick L. Salzman, was indicted on September 27, 1966 for robbery, D.C. Code §22-2901 (1967 ed.). After pleading not guilty at an arraignment on October 7, 1966, Salzman was tried before a jury in the District Court for the District of Columbia and on May 10, 1967, was found guilty (R.256). Judgment was entered and commitment ordered on June 23, 1967. The District Court had jurisdiction pursuant to D.C. Code §11-521 and §24-425 (1967 ed.). Appellant filed a timely

affidavit in support of application to proceed on appeal without prepayment of costs on July 3, 1967.

This court has jurisdiction pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, 930, as amended, U.S. C.A. Title 28, §§ 1291 and 1294.

STATEMENT OF CASE

On the evening of August 15, 1966, James W. Walker arrived in Washington, D. C. on a Trailways bus from New York at the Trailways Bus Terminal. He had approximately a four-hour layover before continuing to Virginia Beach, Virginia, where he lived. After checking his baggage in a locker, Walker walked outside the terminal and circled Franklin Park which was adjacent. He walked to the corner of Fourteenth Street and K Street and decided to turn back to the bus station. Walker entered Franklin Park and stopped at the water fountain and got a drink of water (Tr. 8-10).

Walker testified that a man he identified as Appellant Salzman appeared at that point and asked Walker for a cigarette. After receiving a cigarette, this first man started a conversation with Walker and they sat down on a park bench. A second man appeared at his point and also asked for a cigarette. He remained standing. This second man reached

into his belt and pulled out a pint of wine and offered it to Walker. Walker declined. The bottle was then handed to the first man who took a drink and handed the bottle back to the second man (Tr. 10A). Walker further testified that the bottle was then broken in half and used by the second man as a weapon to menace Walker while he was robbed of his wallet, watch and rings (Tr. 10A).

After a complaint issued by Walker, a warrant for the arrest of Salzman was issued on August 23, 1966.

The United States brought an indictment against Salzman charging him with one count of robbery in violation of the D. C. Code, §22-2901.

A grand jury subsequently returned a true bill on this indictment on September 27, 1966.

Salzman was tried in the United States District Court for the District of Columbia before Judge John Lewis Smith, Jr. and a jury on May 4-10, 1967.

Officer McAllister testified at the trial that he saw Salzman on two occasions on August 16, 1966. The first time at approximately 2:00 a.m., he warned Salzman and a partner of his against having liquor in a park at about 12th and Eye Streets N. W. McAllister confiscated a bottle of wine and poured its contents out at that time

and told Salzman and his partner to leave the park (Tr. 97).

McAllister testified that he encountered Salzman a second time around 4:00 a.m. in a park across from the Trailways bus station at 12th and Eye Streets. Salzman was with the same man as previously. McAllister placed both subjects under arrest at that time for being drunk in public (Tr. 98). Both men were then placed in a police cruiser (Tr. 99).

Salzman testified that he faintly recalled being arrested and drunk on August 16, 1966 (Tr. 153). He further testified that he had been drinking for the last two or three weeks prior to August 16, 1966 (Tr. 160). He testified that he had been found guilty of intoxication about 30 times (Tr. 153-157). Salzman testified that he did not remember being with Walker or Lowery on August 16, 1966 (Tr. 164). He also testified he didn't remember seeing Officer McAllister on August 16, 1966 (Tr. 169). Salzman testified that the whole night seemed to be a partial blackout to him (Tr. 172).

Mrs. Freida Gardner testified that she was presently employed by the District Health Department as a clinic specialist in alcoholism in the Court of General Sessions Chronic Alcoholic Program (Tr. 174). She testified that

she was at Occoquan, Virginia, in the Diagnostic and Classification Center when it first opened in August 1966 when Salzman was admitted to it (Tr. 174). She further testified that Salzman was admitted to the Center on August 16, 1966 and discharged on August 24, 1966 after being sent there by the Court for a period not to exceed 90 days (Tr. 176). Subsequent to his discharge, Salzman was referred to the Chronic Alcoholic Rehabilitation Center at 14th and Que Streets, Northwest, for out-patient treatment as a voluntary patient (Tr. 178). She testified that Salzman was adjudged a chronic alcoholic in August 1966 before being sent to the Center and also when he left the Center (Tr. 178-179). Mrs. Gardner testified that the definition of a chronic alcoholic is a person who cannot control his drinking (Tr. 178-179).

The jury returned a verdict of guilty against Salzman on the single count of robbery on May 10, 1967 (Tr. 256). A motion for judgment n.o.v. by counsel for Salzman was denied (Tr. 258).

On June 23, 1967, Judge Smith sentenced Salzman to 20 months to five years imprisonment.

On July 3, 1967, Salzman filed an affidavit in support of an application to proceed on appeal without

prepayment of costs, and on July 7, 1967 Judge Smith issued an order granting the motion and ordering the preparation of the trial proceedings transcript except voir dire and final argument at the expense of the U. S.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The following Constitutional Provisions and Statutes are involved in this appeal:

Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Rehabilitation of Alcoholics, Act of Congress of August 4, 1947, 61 Stat. 744, c. 472, D.C. Code §24-501 (1967 ed.):

> ***The courts of the District of Columbia are hereby authorized to take judicial notice of the fact that a chronic alcoholic is a sick person and in need of proper medical, institutional, advisory, and rehabilitative treatment, and the court is authorized to direct that he receive appropriate medical, psychiatric, or other treatment as provided under the terms of this chapter.

D.C. Code §24-502 (1967 ed.):

> The term "chronic alcoholic" means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare.

STATEMENT OF POINTS

1. The trial Judge erred in essentially giving the jury the standardized jury instruction for intoxication (No. 125 - Junior Bar Manual-1966) which was established prior to the Easter decision of this Court dealing with "chronic alcoholism".

> With respect to Point 1, appellant desires the Court to read the following pages of the Reporter's transcript: TR. 97-99, 152-172, 173-180, 244-245 inclusive.

2. The trial Judge erred in failing to distinguish between voluntary and involuntary intoxication in his instruction to the jury on intoxication.

With respect to Point 2, appellant desires the Court to read the following pages of reporter's transcript: Tr. 97-99, 152-172, 173-180, 244-245, inclusive.

3. The trial Judge erred in instructing the jury that "Intoxication or drunkenness is not in itself a defense to a charge of a crime, etc" since "chronic alcoholism" can be a complete defense to a charge of crime having as an element specific criminal intent where the condition of "chronic alcoholism" is the direct cause of the crime or where the crime arises out of that condition.

With respect to Point 3, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 97-99, 152-172, 173-180, 244-245, inclusive.

SUMMARY OF ARGUMENT

Appellant Salzman was adjudged a chronic alcoholic as a result of his arrest on August 16, 1966 for public intoxication. On that same day, he is also alleged to have committed the crime of robbery of which crime he was convicted and out of which this appeal arises.

The crime of robbery requires as one of its elements specific criminal intent to deprive the victim of his

possessions.

In the recent cases of Easter v. D.C., 124 U.S. App. D.C. 33, 361 F.2d 50 (1966) and Driver v Hinnant, 356 F.2d 761 (4th Cir. 1966), modern knowledge concerning alcoholism was applied to determine the criminal responsibility of chronic alcoholics. In Easter, this court held that the well-settled common law principle that conduct cannot be criminal unless it is voluntary precludes the conviction of a chronic alcoholic for public intoxication. In Driver, the Fourth Circuit Court of Appeals held that to convict a chronic alcoholic for public intoxication violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.

These decisions squarely reject the long-standing legal fiction that all drinking by a chronic alcoholic is voluntary as a matter of law. Instead, chronic alccoholism is recognized as a disease with a chronic alcoholic drinking involuntarily.

Recognition of chronic alcoholism as an involuntary disease which is a complete defense to a charge of public intoxication necessarily requires the conclusion that,

like insanity, it will also be a complete defense to a charge of antisocial activity of which it is the direct cause.

It may be rare when a defendant will be able successfully to prove the required causal connection between his alcoholism and the crime committed.

In State v. Pike, 49 N.H. 399 (1869), the New Hampshire Supreme Court held that the questions whether alcoholism is a disease, whether the defendant was suffering from alcoholism, and whether the murder was the product of the defendant's alcoholism, were all questions of fact relevant to determining the defendant's criminal responsibility.

This is analogous to applying the rule in Durham v. U.S., 94 U. S. App. D.C. 228 (1954) where if the crime committed is a product of the mental illness of the defendant, he is acquitted by reason of insanity.

Since the Easter case establishes that the intoxication of a chronic alcoholic is involuntary, it was error for the trial Judge not to make a distinction in his instuctions between voluntary and involuntary intoxication and to instruct the jury that it was their province to decide the question of fact whether the robbery was the

product of appellant Salzman's chronic alcoholism or not.

It is requested that the case be reversed and remanded with instructions that a new trial be held and that at that new trial the defendant would be obliged to show:

1. That he was a chronic alcoholic as defined in Easter who was unable to control his activity, and
2. That the crime he was charged with was a product of his chronic alcoholism or arose out of that state.

ARGUMENT

I. The Trial Judge Should Have Distinguished Between Involuntary and Voluntary Intoxication in his Instructions to the Jury Since The Appellant Had Been Adjudged a Chronic Alcoholic.

Apparently, the first legal recognition of what is now known as chronic alcoholism appeared in Lord Hale's classic treatise, Pleas of the Crown, written in about 1675 and published in 1736 where Lord Hale concluded in Chapter IV that drunkenness would not excuse criminal activity except in two situations: first, when it was caused by the "stratagem or fraud of another"; and

second, when long-continued drinking resulted in what Lord Hale called "habitual and fixed phrensy".

In time, the courts recognized the first of Lord Hale's exceptions as an example of the common law rule that involuntary behavoir cannot be criminal. See Blackstone Commentaries 20, 21. The second exception has served as an example of the rule that insanity excuses what otherwise would be deemed criminal conduct.

The "involuntary behavoir" rule appears based on the rationale that it would be inhuman to punish an individual for behavoir that he lacked the capacity to control. But the courts moved away from this concept to a narrower view as exemplified in M'Naghten's Case, 10 C & F 200, 8 Eng. Rep. 718 (H.L. 1843) where the defense of insanity is applicable only when the defendant did not know the difference between right and wrong.

In order to avoid confrontation with the concept of "involuntary behavoir", the courts adopted a legal fiction - all drinking by a chronic alcoholic was deemed to be "voluntary" as a matter of law on the tenuous theory that even an alcoholic initially had been a voluntary drinker before reaching the chronic state and he should therefore be held legally accountable for his subsequent

disease. Under this legal fiction, a chronic alcoholic was held accountable for all criminal acts that he engaged in, including public intoxication, regardless of whether the acts were an unavoidable product of his alcoholism.

Appellant Salzman was adjudged a chronic alcoholic by the court arising out of his arrest for drunkenness in the early morning on August 16, 1966, the same day he was charged with committing robbery out of which this appeal arises (Tr. 179).

A District of Columbia Statute defines a "chronic alcoholic" as follows:

> The term 'chronic alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that he has <u>lost the power of self-control</u> with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare. (Emphasis supplied.) D. C. Code §24-502 (1967 ed.)

This same statute passed by the Congress in 1947, goes on to ask the courts of the District of Columbia to "take judicial notice of the fact that a chronic alcoholic is a sick person and in need of proper medical, institutional, advisory, and rehabilitative treatment". D.C. Code §24-501 (1967 ed.)

Little attention was paid to this statute until

this Court's decision in Easter v District of Columbia, 124 App. D.C. 33, 361 F.2d 50 (D.C. Cir., 1966). This Court in Easter at P. 36 specifically repudiated the legal fiction that a chronic alcoholic had initially been a voluntary drinker and that he therefore was responsible for all subsequent acts by saying:

> It should be clear from the above that chronic alcoholism resulting in public intoxication cannot be held to be criminal on the theory that before the sickness became chronic there was at some earlier period a voluntary act or series of acts which led to the chronic condition. A sick person is a sick person though he exposed himself to contagion and a person who at one time may have been voluntarily intoxicated but has become a chronic alcoholic and therefore is unable to control his use of alcoholic beverages is not to be considered voluntarily intoxicated. (Emphasis supplied.)

This Court went on to make the following caveat in the Easter decision at P. 36:

> We desire to make clear, however, that we are not absolving the voluntarily intoxicated person of criminal responsibility for crime in general under applicable law. (Emphasis supplied.)

The majority of this Court in the Easter case did not reach the question of the criminal responsibility of an involuntarily intoxicated person for crimes other than public intoxication, although Judges Danaher, Burger and Tamm discussed it in a concurring opinion at

page 44. There Judge Danaher noted that the District of Columbia Statute defining a "chronic alcoholic" goes beyond the inclusion of persons who have lost their self-control with respect to the use of alcoholic beverages and also includes persons who "while under the influence of alcohol endanger(s) the public morals, health, safety or welfare". D. C. Code §24-502 (1967 ed.)

The majority opinion in Easter states flatly at P. 36 that, "One who is a chronic alcoholic cannot have the mens rea necessary to be held responsible criminally for being drunk in public". It would appear that the mens rea necessary for crimes other than public intoxication would also be called into question.

We have seen that a District of Columbia Statute requires that judicial notice be taken of the fact that a chronic alcoholic is a sick person. D.C. Code §24-501 (1967 ed.)

In Driver v Hinnant, 356 F.2d 761 (4th Cir. 1966), the Court held that a North Carolina Statute (providing that any person found drunk or intoxicated in public shall be guilty of a misdeameanor) violated the prohibition against cruel and unusual punishment contained in the Eighth Amendment of the Federal Constitution when applied

to a chronic alcoholic.

The Court in Driver at P. 764 stated:

> The World Health Organization recognizes alcoholism as a chronic illness that manifests itself as a disorder of behavoir.
>
> * * * *
>
> This addiction - chronic alcoholism - is now almost universally accepted medically as a disease. [Of the myriad authorities, these citations will suffice: 2 Cecil and Loeb, A Textbook of Medicine, at 1625 (10th ed. 1959); Manfred S. Guttmacher and Henry Weihofen, Psychiatry and the Law, at 318-322 (1952 ed.); Jellinek, The Disease Concept of Alcoholism, at 41-44 (1960)]
>
> * * * *
>
> The alcoholic's presence in public is not his act, for he did not will it. It may be likened to the movements of an imbecile or a person in a delirium of a fever. None of them by attendance in the forbidden place defy the forbiddance.
>
> This conclusion does not contravene the familiar thesis that voluntary drunkenness is no excuse for crime. The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease. However, our excusal of the chronic alcoholic from criminal prosecution is confined exclusively to those acts on his part which are compulsive as symptomatic of the disease. With respect to other behavior - not characteristic of confirmed chronic alcoholism - he would be judged as would any person not so afflicted. (Emphasis supplied.)

The last sentence of the above quotation is particularly germane. But what behavior is characteristic of confirmed chronic alcoholism and what is not? The

Court in Driver concedes that the chronic alcoholic's movements may be likened to the movements of an imbecile or a person in a delirium of a fever. Are there not crimes involving specific criminal intent where the crime may be negated as the product of the disease of chronic alcoholism?

In Robinson v State of Calif., 370 U.S. 660, 676 (1962), the United States Supreme Court held invalid as cruel and unusual punishment prohibited by the 8th and 14th Amendments a California statute which made drug addiction a crime. The treatment of a narcotics addict as a person suffering from a disease was established.

The Easter and Driver cases precipitated an appeal for certiorari to the U. S. Supreme Court in Budd v Calif., 385 U.S. 913 (1966). However, certiorari was denied in that case with a dissenting opinion by Justice Fortas, joined by Justice Douglas. In his dissent, Justice Fortas made the following comment:

> It is time for this Court to decide whether persons suffering from the illness of alcoholism and exhibiting its symptoms or effects may be punished criminally therefor. The Court has already held that a State may not punish for narcotics addition, that to do so would violate the constitutional prohibition of cruel and unusual punishment. Robinson v Calif., 370 U.S. 660 (1962). Mr. Justice Stewart's opinion for

> the Court in Robinson makes it clear that a State may not constitutionally inflict punishment for an illness whether the illness be narcotics addition or the common cold!

It is interesting to note that on October 9, 1967, the United States Supreme Court agreed to review the case of Leroy Powell, a 66-year old Austin chronic alcoholic and to consider the question whether criminal punishment of alcoholics for public drunkenness is cruel and unusual punishment prohibited by the Constitution.

It is submitted that the distinction between voluntary and involuntary intoxication is significant as a threshold question before reaching the primary question of whether the criminal acts of a chronic alcoholic arise out of or are the product of his chronic alcoholism or not.

It is further submitted that it was error for the trial Judge below to instruct the jury on intoxication using standardized criminal jury instruction No. 125 which antedated the Easter decision. This instruction deals only with the acts of a voluntarily intoxicated person. It takes no notice of the fact that a chronic alcoholic is involuntarily intoxicated and that he is suffering from a disease - chronic alcoholism.

Therefore, no opportunity was afforded the jury to consider the question whether Appellant Salzman's act of robbery arose out of or was a product of his disease of chronic alcoholism.

II. The Trial Judge Should Have Instructed The Jury That Chronic Alcoholism May Be A Defense To A Crime Having Specific Criminal Intent As An Element When The Crime Arose Out Of Or Was A Product Of Chronic Alcoholism.

In the Easter decision in Appendix A at page 40, the following quotation appears:

> It is necessary to recognize that the confirmed inebriate is a person requiring medical attention, and society must face the issue of treating him as an irresponsible individual until he can be rehabilitated. (Emphasis supplied.) Haggard and Jellinek, Alcohol Explored, (1942) p. 273.

This is the crux of this appeal. Was Appellant Salzman sufficiently responsible for his activities on the early morning of August 16, 1966 or was he propelled by unknown forces arising out of his chronic alcoholic state?

Appellant Salzman testified at the trial that he faintly recalled being arrested and drunk on August 16, 1966 (Tr. 153). He further testified that he had been

drinking for the last two or three weeks prior to August 16, 1966 (Tr. 160). Salzman testified that he did not remember being with Walker or anyone else on August 16, 1966 (Tr. 164). He also testified he didn't remember seeing Officer McAllister on August 16, 1966 (Tr. 169). Salzman testified that the whole night seemed to be a partial blackout to him (Tr. 172).

The case of State v Pike, 49 N.H. 399 (1869) is instructive on this issue. The New Hampshire Supreme Court affirmed the trial judge's instructions to the jury where the trial judge instructed that there were three questions of fact relevant to determining the defendant's criminal responsibility for murder:

1. Whether alcoholism is a disease;
2. Whether the defendant was suffering from alcoholism; and
3. Whether the murder was the product of defendant's alcoholism.

Judge Doe there recognized that "When disease is the propelling uncontrollable power, the man is as innocent as the weapon" and thus if alcoholism had driven an individual involuntarily to commit murder, he could not be convicted for even so serious an involuntary act. Id at P. 441.

It appears no longer to be questioned that an insane person cannot constitutionally be convicted for antisocial conduct caused by his insanity based on the rationale that his conduct is involuntary. For the same reason, an epileptic cannot constitutionally be prosecuted for disorderly conduct that may arise from an epileptic seizure. Nor can conduct that is an involuntary symptom or direct product of any other recognized disease constitutionally be prosecuted as a crime.

In Durham v United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (D.C. Cir., 1954), this Court favorably cited the Pike case in these words at P. 240-241:

> The rule we now hold must be applied on the retrial of this case and to future cases is not unlike that followed by the New Hampshire court since 1870 (citing State v Pike). It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

It is submitted that there is no reason why the rule of the Durham case should not be applied in the instant case. It should be submitted to the jury to determine whether Appellant Salzman was a chronic alcoholic at the time of his unlawful act and if he were deemed such, whether his unlawful act was a product of his chronic alcoholism or arose out of that state.

This Court in the Durham case at Pages 241 and 242 explained the application of the rule for mental disease in this way:

> We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.
>
> Whenever there is 'some evidence' that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible.
>
> * * * *
>
> Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.
>
> * * * *
>
> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility. The rule we state in this opinion is designed to meet these requirements.

It would appear appropriate to apply a similar two-part test in cases involving chronic alcoholism.

A major problem will confront the trial judge and jury in resolving the factual question whether a particular defendant's chronic alcoholism is the cause of the antisocial conduct for which he is being prosecuted. The trial judge is under an obligation in his instructions to the jury to set forth sufficient guidelines to the jury that they will be enabled to make an intelligent factual determination.

Where the unlawful conduct is closely related to alcoholism - simple drunken disorderly conduct for example - no difficulty is encountered in making a factual determination. However, where the conduct is not normally associated with alcoholism - in cases involving murder, forgery, burglary for example - difficult factual determinations must be made.

It is instructive to note that although alcoholism has been available as a defense to murder in the State of New Hampshire since 1869, no devastating consequences in that State have been discerned as a result of that decision. Practically, it may be only on rare occasions that the defendant will be successful in proving the causal connection between his chronic alcoholism and the crime committed.

There must be a nexus between the crime committed and the chronic alcoholic state. It would be very difficult, for example, to use chronic alcoholism as a defense to the crime of conspiracy to defraud creditors where the fraudulent action took place over a period of years. Intelligent planning and understanding of the scheme are implicit in its execution. On the other hand, a crime of violence such as robbery, rape, murder, arson and the like, could be causally connected. to chronic alcoholism since the defendant may have the physical capacity to commit the crime, but perhaps he may not be sufficiently mentally alert to have the mens rea necessary as an essential element of the crime.

It would appear that crimes that are malum prohibitum, such as carrying a dangerous weapon, would be unaffected whether committed by a chronic alcoholic or not since they do not require specific criminal intent or scienter.

In Morissette v United States, 342 U.S. 246 (1952), Justice Jackson distinguished between public welfare offenses (malum prohibitum) which do not require intent as a necessary element of the crime and crimes that do

require intent (malum in se). He explained that the purpose of the establishment of public welfare offenses was to require a degree of diligence on the part of individuals so that the general public would be thereby benefited without imposing harsh punishments.

It is submitted that the establishment of the disease of chronic alcoholism as a possible defense to a crime having specific criminal intent as an element upon a showing that the crime arose out of or was a product of such chronic alcoholism, would not be a revolutionary step for the reasons above cited. Further, such a move is consistent with the District of Columbia Statute on the subject of alcoholism, the Easter decision and the Durham decision, and would appear to be a natural outgrowth of them.

CONCLUSION

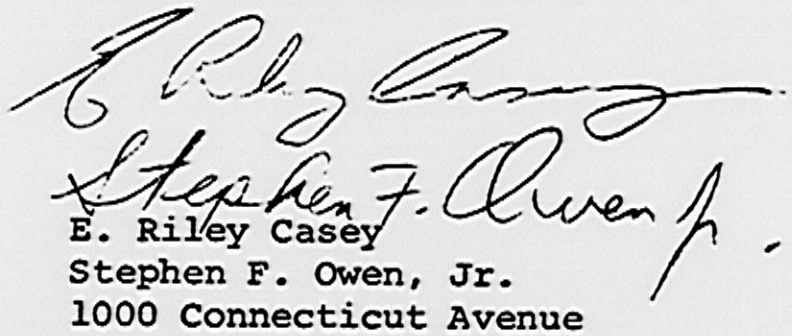
For the reasons and upon the authorities set forth herein, this Court should reverse and remand this case to the District Court with instructions that a new trial be held and that at that new trial the following factual issues be considered:

1. Whether the Appellant Salzman was a Chronic alcoholic at the time of the

alleged commission of the act of robbery by him, and if so,

2. Whether the acts he was charged with were a product of his chronic alcoholism or arose out of that state.

Respectfully submitted,



E. Riley Casey
Stephen F. Owen, Jr.
1000 Connecticut Avenue
Washington, D. C. 20036
Attorney for Appellant
(Appointed by this Court)

November 9, 1967

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,172

FREDERICK L. SALZMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,201

JAMES E. LOWERY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM M. COHEN,
Assistant United States Attorneys.

Cr. No. 1130-66

QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented:

I

Did the trial court commit plain error in its instructions on the relationship between intoxication and specific intent by not instructing the jury to consider whether robbery was a product of "chronic alcoholism," where the only issue was whether appellant Salzman was so intoxicated as to be unable to form the intent to steal?

II

May appellant Salzman claim for the first time on appeal that the trial court erred by failing to give instructions which were not requested below and which were not supported by either the proffer or introduction of evidence to justify a request for those instructions had it been made below?

III

Should this Court establish a rule of criminal responsibility limited to a particular medical "label," classified as such for treatment purposes, such as "chronic alcoholism," where such a rule would be in conflict with the *Durham-McDonald* rule, the exclusive test for criminal responsibility in this jurisdiction?

IV

Were the prosecutor's summary of facts and arguments therefrom in his closing statement, made with the trial court's approval and unobjected to below by appellant Lowery, erroneous? If so, were they so prejudicial as to amount to plain error affecting substantial rights?

V

Did the trial court err in allowing testimony of record to be read to the jury by the court reporter from her notes in response to the jury's request for this information?

INDEX

TABLE OF CASES

OTHER REFERENCES

---

*References chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,172

FREDERICK L. SALZMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,201

JAMES E. LOWERY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 27, 1966, appellants were indicted for robbery (force and violence). (Criminal No. 1130-66.)

They were tried together by a jury on May 4, 8-10, 1967, before Judge John Lewis Smith, Jr. On May 10, the jury found both appellants guilty, and on June 23, 1967, appellants were both sentenced to terms of imprisonment of from twenty months to five years. Both appealed, and by order of this Court entered *sua sponte* on August 18, 1967, these appeals were consolidated for all purposes, although appellants raise no common questions for appellate review.

The Robbery of James Walker

James W. Walker, a 25 year old carpenter from Virginia Beach, Virginia, went on vacation the last weekend in July, 1966 and traveled to North Carolina, Louisville, Kentucky, and Brooklyn, New York (Tr. 4-7). For his return trip, on August 15, 1966, Walker purchased a one-way ticket from New York to Virginia Beach from the Trailways Bus Company, and when he boarded the bus that evening he had about $39.00 left of his vacation funds. At trial, Walker was not positive of the time he boarded the bus, but said it was somewhere "around 3:00 or 4:00 o'clock in the evening" (Tr. 8, 63). The bus arrived in Washington, D.C. at approximately 11:45 p.m., and Walker had about a four hour layover in the District before boarding another Trailways bus for Virginia Beach (Tr. 8-9).

Walker had never been in the District before (Tr. 39) and decided to walk around while he had some time. He checked his baggage, walked past the bus station towards Fourteenth Street, N.W., and circled around Franklin Park until he reached Fourteenth and K Streets, N.W. At that point he became concerned about getting lost and missing his bus, so he turned around and started back to the bus station. He entered Franklin Park at 14th and K and stopped at a water fountain just inside the park's entrance for a drink of water (Tr. 9-10, 67).

Before Walker could proceed through the park to the bus station, a man, whom he identified as appellant Salz-

man (Tr. 11), approached him and asked for a cigarette. Walker gave him one and they began talking; since they were right near a row of benches, they sat down and continued their conversation (Tr. 10-A, 67). Salzman asked Walker where he was from, what he was doing in the District, and where he was going; Appellant also told Walker he had been in the Army but was retired and was living and working in Washington (Tr. 10-A, 12). During this conversation a second man, whom Walker identified as appellant Lowery (Tr. 12), came up to them and asked Walker for a cigarette, which he gave him. Lowery asked Walker the same questions as Salzman had asked him.

During the duration of this encounter between appellants and Walker, Salzman was sitting down on Walker's left and Lowery remained standing up on Walker's right. It was about 1:00 a.m., August 16, 1966, at the time, and it was not very dark in that part of the park, there being a street lamp about ten feet from the bench (Tr. 10A-14, 29). Walker testified that Salzman was wearing a pale yellow shirt with black pants and "Lowery had on a white short-sleeved shirt with a blue band around the collar" and black pants (Tr. 14).

After they talked for about five to ten minutes (Tr. 13), Lowery reached into his belt, pulled out a pint-sized bottle of wine, and offered Walker a drink. Walker declined, stating, "no, I don't drink," whereupon Lowery took a drink and handed the bottle to Salzman, who took a drink and handed the bottle back to Lowery. Lowery finished the bottle, and proceeded to break it across the back of the bench to the right of Walker's right shoulder. He held the jagged end at Walker's throat and demanded, "give me all your money and everything or else I will cut your throat" (Tr. 10A, 15, 71-73). Walker took his wallet out and Salzman took it from him, went through it, removed the money, and threw the wallet back on the bench. Salzman then demanded (Tr. 15) and took Walker's gold Bulova watch, a school ring with the inscription "C.U. 1963" and "Montezuma H.S." on it,

and two other rings, along with about $37.00 from Walker's wallet. He then said, "we ought to cut your throat but we are not going to. * * * get back on the bus and go home and * * * forget all about this" (Tr. 10-A, 16-18). Throughout the robbery, Lowery held the jagged end of the bottle within inches of Walker's throat and said, "if you make a move before we get out of here, we'll come back and cut your throat" (Tr. 18, 71, 73).

After taking the above items, appellants threw the broken bottle in a trash can to the left of the bench and walked on through the park at "a regular pace." Salzman retained possession of Walker's property in his hand as they walked away from their victim (Tr. 10A-11, 18-19, 71-72). Although Walker could smell alcohol on appellants' breaths when they first came up to him, "they weren't drunk" (Tr. 19).

Walker immediately left the park in search of a policeman. After several contacts and some time, he was turned over to two detectives who accompanied him through the park several times in an unsuccessful search for his two assailants (Tr. 21-24). Shortly after 2:00 a.m. he met Detective Harold R. Muns, U.S. Park Police, in the vicinity of Franklin Park (Tr. 25, 110-11). Muns had received a radio dispatch to respond to that location in regard to a robbery complaint. He and Walker got into the police cruiser and spent a considerable amount of time cruising the downtown area, particularly in the vicinity of the parks, in an effort to locate the suspects in this case (Tr. 25, 11-12).

"Shortly after 4:35 a.m.," Muns received a radio communication to meet another Park Police cruiser in the 1300 block of H Street, N.W. and proceeded there with Walker where he met Lieutenant Robert Kerzayn and Private Wendall McAllister of the U.S. Park Police. McAllister had arrested some men for being drunk in public, one of whom was appellant Frederick Salzman (Tr. 25-26, 112-13). McAllister had first encountered Salzman with another man in a park in the vicinity of 12th and

I Streets, N.W. at approximately 2:00 a.m. on August 16, 1966. At that time, the officer warned the two men against having liquor in the park, confiscated a bottle of wine from appellant, poured out its contents, and told them to leave the area. McAllister was close enough to Salzman to hold a conversation with him and he noticed only a "slight odor of alcohol" on Salzman's breath. McAllister did not consider appellant intoxicated to the point where the officer would arrest him for being intoxicated in public (Tr. 97-98, 103-04). The other man with Salzman was not appellant Lowery (Tr. 102, 105).

McAllister next encountered Salzman with this same man about 4:00 a.m. or shortly thereafter in a park directly across from the Trailways bus station at 12th and I Streets, N.W. They apparently had taken quite a few more drinks since the first encounter and were intoxicated at that time. McAllister placed both men under arrest for being drunk in public, searched them routinely, and placed them in the rear of his cruiser while he called for assistance (Tr. 98-99). At that time he noticed appellant Salzman trying to "ease something under the rear seat of the car" with his left hand. The officer grabbed appellant's hand and saw it contained a high school class ring with the initials "C.U." on it (Tr. 99-100). Realizing that this ring fit the description of a ring that had been broadcast earlier as the fruits of a robbery and remembering that a total of three rings and a gold watch had been stolen, McAllister searched Salzman more thoroughly and found the watch in his right pocket (Tr. 100-01).

The earlier broadcast had stated that the robbery complainant, Walker, was with Detective Muns, so McAllister called Muns who arrived two or three minutes later with Walker. McAllister at that time turned over to Muns the watch and the ring, Government's Exhibits 1 and 2, respectively, which were identified by Walker as part of the property stolen from him by appellants (Tr. 19-21, 100-02).

Upon meeting McAllister, Muns asked Walker to look at the men in the cruiser who were under arrest to see

if he recognized any of them as his assailants (Tr. 102, 114). Walker looked at the men and told Muns that he thought Salzman was one of the robbers but he was not positive because he could not get a good look at him from the outside of the cruiser (Tr. 26-28, 40, 102-03, 114-15). At this time Salzman was wearing a pale yellow short-sleeved shirt and black pants (Tr. 27, 107, 114). Walker got a better opportunity to view Salzman later that morning at police headquarters when appellant was with a group of eight or nine other men. After giving the matter some consideration when he had a chance to rest he became positive that Salzman was one of the men and so informed Detective Muns on the evening of August 16 (Tr. 27-29, 41, 69-71, 136).

At about 5:00 a.m. (Tr. 129), Muns returned with Walker to Franklin Park and the scene of the robbery. From the trash receptacle to the left of the bench in the northwest corner of the park where Walker had been sitting, Muns removed a fragment of a bottle which Walker identified by its color and jagged edges as being similar to the one used by Lowery to assault him. The trash receptacle was empty except for the bottle fragment and a newspaper (Tr. 129). Alongside the bench Muns recovered some more bottle fragments (Tr. 29-30, 73, 117-19). Muns then took Walker and the bottle fragments to the identification division of the Metropolitan Police Department, where he personally, as a trained fingerprint analyst, lifted three latent fingerprints from the fragments and placed them on an identification card at 5:30 a.m. (Tr. 120-23). One of the latent prints was identified by an expert in the field of fingerprint identification as matching the left thumb print taken from appellant Salzman on the day of his arrest, August 16, 1966 (Tr. 137-41). The other two latent prints did not contain enough characteristics to enable the expert to form an opinion as to their identity (Tr 144-45).

Shortly after 5:30 a.m. (Tr. 124), Muns and Walker met with Detectives Joseph P. Butler and Robert I. Hen-

ningar, U.S. Park Police. (Tr. 30-31.) Walker gave these detectives a description of the men who robbed him. His description matched that of a man the detectives had spoken with earlier at George Washington University Hospital who had reported "a similar case that had occurred in the park at the same time, approximately 1:00 a.m." (Tr. 53, 55, 84, 88).

At about 2:00 a.m. on the morning of August 16, Detectives Butler and Henningar responded to the emergency room of George Washington University Hospital to investigate a complaint of a robbery which allegedly had occurred in Franklin Park earlier that morning (Tr. 84-85, 88). Upon arrival at the hospital they spoke with appellant James Lowery who was being treated in the emergency room for two, 3-inch lacerations on the left side of the "back part of his neck" (Tr. 85). Lowery was stripped to the waist and had on dark trousers. His blood soaked shirt was lying underneath the treatment table. "[I]t was a polo type shirt with a blue trimming * * * around the neck like a crew type shirt" (Tr. 85-86). Lowery told the officers he had been sitting in the southeast corner of Franklin Park near 13th and I Streets, N.W., when he was attacked from behind by three Negro males and robbed of $3.00. He claimed to have been cut during a scuffle with these men. He had an odor of alcohol on his breath but was not staggering or unable to stand. Since appellant had not yet been sutured the officers told him they would discuss this incident with him later and left the hospital (Tr. 86-87). The officers went back to Franklin Park and looked over the scene of Lowery's alleged attack. Because of the close proximity of very dense high bushes to the benches in that area, it seemed unlikely to them that anyone could have gotten behind Lowery to attack him as he claimed. Thereafter they responded to Park Police Headquarters and discussed the matter with Muns and Walker and concluded that Lowery fit the description of one of Walker's assailants (Tr. 87-88).

At about 6:00 a.m., Butler and Henningar took Walker to the D.C. Annex or Hotel in the 800 block of K Street, N.W., the address Lowery had given them at the hospital, and proceeded to Lowery's room. Lowery answered the door; the detectives entered and talked with him, while Walker stood in the doorway where he could see inside (Tr. 31-32, 89-90, 93). Lowery had a bandage on the left side of the back of his neck behind his ear. He sat down on the side of his bed while the officers talked with him so that the side of his face was facing the door (Tr. 33-34, 82, 90, 94-95).

In response to the prosecutor's question, "Did you make any inquiry of Mr. Lowery at that time about the white shirt with the blue trim on it?" Detective Butler answered:

> Yes. That was the one question that we wanted answered. We asked him where was his shirt and he stated that he left it at the hospital, and to the best of my recollection, and I am not sure of this, he left in a hospital gown, just upper part, and he had stopped at a hotel located in the 900 block of K—of New York Avenue, where a friend gave him another shirt, and he didn't have the shirt with him in the room, and he said he left it at the hospital.
>
> We checked the hospital later that morning and it wasn't there. We couldn't find the shirt that he had when he was originally cut. (Tr. 90-91.)

After talking with Lowery for about three or four minutes, the detectives left without him. Upon leaving the hotel, Walker told them he was "positive" that Lowery was the man who held the bottle to his throat (Tr. 33, 90). When asked by the prosecutor, "When you first saw the defendant Lowery, why was it that you were positive of him and you had not been of Salzman?" Walker replied:

> Well, he was the man that was holding the bottle to my throat. I was constantly staring right in his eyes, and right at the bottle, and that is a face that I won't never forget. (Tr. 71.)

At trial Walker positively identified both appellants as his assailants (Tr. 11, 12, 35).

Appellants' Cases

A. *Appellant Salzman's defense.*

In his opening statement to the jury, appellant's counsel called the jury's attention to the fact that one of the elements of robbery was the specific intent to steal. He stated that appellant would show that at the time of this offense he was under the influence of alcohol, that he had since been adjudicated a "chronic alcoholic," and therefore should be acquitted of the charge (Tr. 148-49).

Appellant testified on direct examination that he had been drinking on August 16, 1966, but he only faintly recalled being arrested and drunk on that day (Tr. 152-53). In response to his counsel's questions based on appellant's Metropolitan Police criminal record, Salzman acknowledged that he had been arrested, convicted or forfeited collateral on approximately 20 charges of public intoxication from February, 1960 to August, 1966. He was acquitted, however, of the August 16, 1966, charge of public intoxication by reason of chronic alcoholism (Tr. 153-57). He said he had been in the armed forces on three separate occasions, having twice served in the United States Army (Tr. 158). On cross-examination, Salzman admitted that he had known appellant Lowery for a few weeks prior to August 16, and had been drinking with him off and on during that period (Tr. 160). He did not recall being with Lowery on the morning of the robbery but he did remember being with him the day before (Tr. 161-63, 169). He denied knowledge of how Lowery got cut, but also denied emphatically that he did it (Tr. 168). He could not recall having Walker's watch and ring, but he denied trying to hide the ring and did recall being asked about these items by the arresting officers (Tr. 165-67). Salzman stated that there are different degrees of how drunk a person can be, "sometimes you

are high and sometimes you are higher and sometimes you don't know what you are doing" (Tr. 171-72). It seemed to him that he had been drinking for the last two to three weeks prior to the night in question, that he had taken "quite a few" drinks that night, and that it seemed to be a "partial blackout" to him (Tr. 160, 172).

Freida Gardner, a clinic specialist in alcoholism for the District of Columbia Health Department, testified that in August of 1966 she was assigned to the Diagnostic and Classification Center at Occoquan, Virginia. The purpose of the center was to develop a case history of a person referred there by the District of Columbia Court of General Sessions to determine what, if any, treatment would be best for that person (Tr. 174-75). Appellant Salzman was admitted to the center on August 16, 1966 and discharged on August 24, 1966. He was subsequently adjudicated a chronic alcoholic by the Court of General Sessions in August, 1966, and that court accepted the Health Department's recommendation that appellant be referred to the Alcoholic Rehabilitation Center at 14th and Que Streets, N.W., for out-patient treatment as a voluntary patient (Tr. 176-78).

Mrs. Gardner testified that the definition of a chronic alcoholic is a person who cannot control his drinking and that appellant was an habitual drinker who loses control over his drinking once he starts (Tr. 178-79). On cross-examination, she acknowledged that the court and not the Department of Health must make the legal determination of whether a person was a chronic alcoholic, that a person adjudicated could not be prosecuted for public intoxication, that thereafter a person acquitted of drinking in public because of chronic alcoholism would be referred to the Health Department for treatment, and that the term "chronic alcoholic" did not pertain to any criminal act other than public intoxication (Tr. 179-80).

No attempt was made by appellant Salzman to qualify Mrs. Gardner as an expert in the diagnosis and treatment of alcoholism or as a medical or psychiatric expert,

which might have enabled her to render opinions with respect to any of the relevant issues raised at trial. Appellant did not attempt to establish, through this witness or with any other evidence, that his alcoholism was related to or in addition to a mental disease or defect with which he was suffering; nor was the effect his alcoholism and/or some abnormal mental condition might have on his mental or emotional processes and his ability to control his behavior explored. Finally, there was no testimony concerning whether the robbery was related to or the product of appellant's alcoholism and/or some mental disease or defect.

B. *Appellant Lowery's Defense.*

Appellant Lowery's case consisted solely of an attempt to impeach the victim Walker's credibility by trying to show that he had been either mistaken or untruthful in his testimony concerning his time of departure from New York and arrival in Washington. He therefor introduced the schedule of departures from New York and arrivals in D.C. of Trailways buses on August 15-16, 1966 (Tr. 189-94). However, cross-examination revealed that this scheduling could have embraced the broad range of departure stated by Walker who was not positive of that time (Tr. 195-98).

Lowery did not testify and presented no affirmative defense to this charge.

Instructions and Closing Arguments

A. *Specific Intent.*

At the end of the proceedings on May 8, 1967, the day before counsel's closing arguments and the court's charge to the jury, the court inquired of counsel whether they had any requests for instructions. The government indicated it would have no objection to an instruction on the effect of intoxication on Salzman's ability to form the specific intent to steal and its relation to the government's

burden of establishing that element beyond a reasonable doubt. However, the prosecutor also requested an instruction to the effect that chronic alcoholism, by itself, was not a defense to a crime other than public intoxication and that the jury should consider appellant's drinking habit only on the question of appellant's intent at the time of this offense (Tr. 181-82). At this time, Salzman's counsel indicated only that he was considering requesting instructions on the lesser included offenses of simple assault and taking property without right, *both* general intent crimes, and would advise the court on his position the next morning (Tr. 184).

The next morning, counsel requested that "the intoxication instruction be given" and that the fact appellant had been adjudicated a chronic alcoholic should be presented to the jury for its consideration on the element of specific intent (Tr. 187-88). The court stated:

> I will instruct the jury in connection with the standardized instructions on intoxication, that chronic alcoholism is not a defense to the crime of robbery as charged in the indictment, but that his condition of sobriety shall be taken into consideration as to whether or not he was too drunk to form the necessary specific intent. (Tr. 188-89.)

Appellant's counsel thereupon indicated his satisfaction with this proposed instruction by answering, "Thank you, Your Honor" (Tr. 189). No written requests for instructions were filed with the court by appellant pursuant to Rule 30, Fed. R. Crim. P.; at no time either orally or in writing did appellant request an instruction which differed from the above quoted proposal by the court. Nor did appellant request that the jury be instructed to consider whether the robbery was a product of appellant's chronic alcoholism in determining appellant's intent or responsibility for this act.

In his closing argument, government counsel informed the jury in accordance with the court's proposed instructions that chronic alcoholism did not excuse crimes other

than public intoxication, but that the fact of appellant's adjudication as a chronic alcoholic was admitted in evidence to indicate to the jury the extent of appellant's drinking problem and to aid the jury in determining whether Salzman was too intoxicated at the time of this offense to formulate the specific intent to steal. Nevertheless, he argued that despite Salzman's propensity for alcohol his actions at the time of the robbery and especially three hours later when he was arrested for public intoxication and tried to conceal the incriminating stolen ring proved that he was conscious of what he was doing and of the significance of his situation and hence was capable of forming the intent to steal (Tr. 211-13).

Salzman's counsel asked the jury to pay particular attention to the court's instructions on specific intent as an element of robbery and urged the jury "to find the defendant not guilty of the crime of robbery by reason of the fact that he did not have the specific mental intent to do these acts on the day in question" (Tr. 218-19). Appellant's theory was that he had been "adjudicated a chronic alcoholic" who is therefore unable to control his drinking and "gets to a stage where his mind gets numb with alcohol"; hence, appellant argued, "he had no specific intent to do these acts" (Tr. 22).

The court instructed the jury concerning the meaning of the term "specific intent to steal" as an element of robbery and told the jurors they "may consider any statement made, and act done or omitted by the defendant or all of the facts and circumstances in evidence which indicate his state of mind" (Tr. 242-43). The court specifically instructed on Salzman's defense of intoxication as follows (Tr. 244-45):

> Now, the defense of the defendant Frederick L. Salzman in this case is intoxication.
>
> Intoxication or drunkenness is not in itself a defense to a charge of a crime, but the fact, if it is a fact, that the defendant may have been intoxicated at the time of the commission of the offense, may

negate the existence of a state of mind, an essential element of the offense.

An essential element of the offense of which the defendant is charged is that he had the specific intent to steal. Even though the defendant may have been intoxicated to some degree, if you find that the Government has proved beyond a reasonable doubt that the defendant was capable of forming the specific intent to steal, and had the specific intent, and that the Government has proved beyond a reasonable doubt all other essential elements of the offense, you may find the defendant guilty.

On the other hand, if you find that the Government has failed to prove beyond a reasonable doubt that at the time of the commission of the alleged offense that the defendant was incapable of forming the specific intent to steal, and had no specific intent, you must find the defendant not guilty.

Now, chronic alcoholism is not a defense to the crime of robbery charged in this indictment, but the defendant Salzman's condition of sobriety may be taken into consideration by you in determining whether he was so intoxicated as to be incapable of forming the required specific intent.

At the conclusion of this charge, appellant's counsel expressly indicated his satisfaction therewith (Tr. 246-47).

B. *Appellant Lowery's Shirt.*

Prior to closing arguments, the government requested an instrument on concealment of evidence as creating an inference of a guilty conscience on the basis of the evidence in the record of the disappearance of appellant Lowery's shirt. Lowery's counsel objected, and the court declined to give the instruction. However, the prosecutor inquired, "But I will not be precluded from arguing it?" and the court ruled, "You may argue it but there will be no specific instruction" (Tr. 183-84, 201-02). Lowery's counsel did not object to this last ruling.

In his closing argument, the prosecutor made the following statements (Tr. 214-15, 216-17):

> Let's go a little further as to the defendant Lowery. In addition to Mr. Walker saying that he looked at him primarily and knows him because Lowery was the one holding the bottle to his neck, he told you what Lowery was wearing, and that was a white polo shirt, as I recall, with some sort of blue trim around the neck, and if you recall, ladies and gentlemen, about 2:00 a.m. in the morning get a very strange call. They find a man was cut at the hospital, and he is at George Washington and Detective Butler with his partner goes over to George Washington Hospital and they find a man with his shirt off lying on a table being treated for a cut somewhere behind the left ear.
>
> They look at this shirt, although they know nothing about the Walker case, and Detective Butler recalls what that shirt was like. He told you that it was a white shirt and it had blue trim on the collar, and he didn't have any reason to take anything—he didn't have any reason to take specific note of it then, but he did know that it was blood-soaked at the time. There was no question that Mr. Lowery had been cut up.
>
> A little later in the morning they went to the D.C. Hotel, and remember now that Detective Butler and his partner have a story from Lowery, a story that they are suspicious of, and I think Butler told you why he was suspicious of that story, and it was because Lowery described the place in Franklin Park, and he actually put himself back in Franklin Park, and it was about the time that this happened to Walker.
>
> * * * *
>
> What further evidence is there against the defendant Lowery? He is positively identified and you must remember the circumstances that Mr. Walker was in and the reason he would remember the face of a man that held that bottle. He was wearing a white shirt with blue trim and it is seen by detectives, and

> he has given a story which the detectives find suspicious, if not incredible, therefore, they take Walker and, ladies and gentlemen, what happened to that shirt?
>
> Somewhere between the hospital and the D.C. Hotel, where the police found Mr. Lowery, Mr. Lowery disposed of that shirt. Why? Well, that is the type of thing that probably would be more easily remembered than even the face, and that was not found. Mr. Lowery says he lost the shirt. That shirt could be used to identify him. Mr. Lowery attempted to conceal that shirt. That is guilty knowledge. That shirt disappeared. Why would a man's shirt disappear?

At no time, either during the course of the prosecutor's argument or thereafter, did Lowery's counsel object to the former's representation of the facts in evidence or the inference to be drawn therefrom. Instead, in his own argument, Lowery sought to capitalize on the government's position and gain the jury's sympathy by accusing the government of unfairly exploiting Lowery's unfortunate situation of having been cut and allegedly robbed in the same park as Walker (Tr. 222-24).

The trial court, of course, instructed the jury that it was the sole judge of the facts, that counsel's arguments were not to be considered evidence, and that it should base its decision on its own recollection of facts in evidence, not on the recollection of counsel or the court (Tr. 233-34). Counsel for appellant Lowery expressed complete satisfaction with the court's instructions (Tr. 247).

C. *The Jury's Note.*

After some deliberation, the jury sent a note into court requesting the following information:

1. The time of the robbery of James Lowery in the park.
2. The time that James Lowery was admitted at the hospital.

3. The time of the robbery of Walker. (Tr. 248; record in Crim. No. 1130-66 filed March 9, 1967.)

The prosecutor recalled that Walker testified he was robbed around 1:00 a.m. and Lowery's attorney agreed, but he did not recall the other two times being in evidence (Tr. 248-49). All counsel agreed and the jury was instructed that "if those times are available in the *transcript*, and if there was *evidence* on the exact time, you are entitled to have that *evidence*" (Tr. 249-50). (Emphasis added.)

The jury was excused overnight and the court reporter was asked to review her notes to determine if the pertinent testimony could be located therein (Tr. 250-51). The next morning, the court discussed the reporter's findings with counsel with the jury excluded. As to the first question, the time of the robbery of appellant Lowery, the reporter read the following excerpt from Detective Butler's testimony (Tr. 253):

> "Question: What did you and your partner, Detective Henninger, do after taking this report from Mr. Lowery?
>
> "Answer: We went back to Franklin Park and looked it over and we responded to Headquarters, our Headquarters, and we discussed this matter with Detective Harold R. Muns, and he had a similar type case that occurred in the park at the same time, approximately 1:00 a.m., and in talking to him he gave us a description of the two in his particular case."

Lowery's attorney objected to this statement being read to the jury on the ground that it was hearsay. The prosecutor pointed out that a hearsay objection should have been made when this testimony was given and in any event the information as to the time of Lowery's assault was based on appellant's report to Butler and hence was admissible as an exception to the hearsay rule. The court decided to give this testimony to the jury (Tr. 253-54).

In addition to this testimony, the reporter gave the following answers to the jury's other two questions:

> Question 2: "The time that James Lowery was admitted at the hospital." There was no *testimony* with reference to that.
>
> Question 3: "The time of the robbery of Walker." The answer to that was: "About 1:00 a.m." (Tr. 255.) (Emphasis added.)

There were no objections to the latter two answers, and appellant requested no further instructions to accompany the jury's consideration of this evidence. The jury resumed its deliberations and approximately thirty-five minutes later rendered its verdict of guilty against both appellants (Tr. 256-57).

STATUTES INVOLVED

Title 24, District of Columbia Code § 501 provides:

> The purpose of this chapter is to establish a program for the rehabilitation of alcoholics, promote temperance, and provide for the medical, psychiatric, and other scientific treatment of chronic alcoholics; to minimize the deleterious effects of excessive drinking on those who pass through the courts of the District of Columbia; to reduce the financial burden imposed upon the people of the District of Columbia by the abusive use of alcoholic beverages, as is reflected in mounting accident rates, decreased personal efficiency, growing absenteeism, and a general increase in the amount and seriousness of crime in the District of Columbia, and to substitute for jail sentences for drunkeness medical and other scientific methods of treatment which will benefit the individual involved and more fully protect the public. In order to accomplish this purpose and alleviate the problem of chronic alcoholism, the courts of the District of Columbia are hereby authorized to take judicial notice of the fact that a chronic alcoholic is a sick person and in need of proper medical, institutional, advisory,

and rehabilitative treatment, and the court is authorized to direct that he receive appropriate medical, psychiatric, or other treatment as provided under the terms of this chapter.

Title 24, District of Columbia Code § 502 provides:

> The term "chronic alcoholic" means any person who chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare.

SUMMARY OF ARGUMENT

I

The only issue presented for jury determination where a defendant claims that intoxication negatived the specific intent requisite for robbery is whether the individual was so intoxicated as to be unable to form the intent to steal. Therefore, whether the cause of intoxication may be classified as "voluntary" or "involuntary," or whether the robbery was a "product" of "chronic alcoholism" are irrelevant considerations to a question involving the degree of intoxication, not its origin. Thus, the trial court did not commit plain error by failing to instruct on specific intent along the lines suggested by appellant Salzman for the first time on appeal.

II

No evidence was either proffered or introduced by appellant Salzman to establish that the robbery was a product of chronic alcoholism or an irresponsible act within the standards of the *Durham-McDonald* rule. No request was made below that the trial court instruct that the jury must consider whether the robbery was a product of chronic alcoholism either with respect to intoxication and specific intent, which was in issue, or concerning the question of criminal responsibility, which was not raised below. Moreover, appellant Salzman expressly concurred

in the trial court's instructions on specific intent. Hence, he may not claim for the first time on appeal that the trial court failed to give instructions for which there was no factual basis and which were not requested below.

III

The exclusive ultimate test of criminal responsibility in this jurisdiction is the *Durham-McDonald* rule. This test is designed to allow the maximum amount of information concerning the mental makeup of the accused to be presented to the trier of fact and to avoid the "trial by label." Should this Court adopt the standard of responsibility suggested by appellant Salzman, which would excuse an individual of responsibility for criminal acts if the act was a "product" of "chronic alcoholism" as that term is defined for treatment purposes, then this Court's thirteen year effort since *Durham* to eliminate labels from the insanity trial will have been for naught. The label "chronic alcoholism" will have been elevated to a rule of law. Such a rule is in direct conflict with the *Durham-McDonald* rule. Appellee submits, it would also be an unnecessary and unwise step backwards in the development of the test of responsibility in this jurisdiction.

IV

The prosecutor's argument, that the shirt worn by the man who held the broken wine bottle at the robbery victim's throat and the shirt allegedly left by appellant Salzman at the hospital were the one and the same, was strongly supported by the evidence. His argument that Lowery must have disposed of the shirt to avoid its incriminating use against him was supported by Detective Butler's testimony. The trial court expressly ruled that the prosecutor could make such an argument and neither before, during or after the argument did appellant object thereto. Moreover, even if erroneous, it is clear from appellant's counsel's own tactics and the strength of the government's case, that appellant Lowery was not so prejudiced by these statements as to amount to plain error.

V

The trial court instructed the jury that it could have the answers to its questions if there was "evidence" on those points. By allowing the court reporter to read the "testimony" from her notes, it was clear to the jury that the source of the information was the evidence of record. Hence, the trial judge did not usurp the jury's fact-finding function by this practice.

ARGUMENT

I. The trial court correctly instructed the jury on the relationship between appellant Salzman's alleged state of intoxication and the element of specific intent to steal in the crime of robbery.

(Tr. 10-A, 16-19, 97-98, 103-04)

Appellant Salzman contends that the trial court's instruction on intoxication and specific intent was erroneous because it failed to distinguish between "voluntary" and "involuntary" intoxication and did not include a charge to the effect that the specific intent to steal in the crime of robbery could be negatived by a finding that this crime was the "product" of "chronic alcoholism."

Appellee submits that, notwithstanding the absence both of any objection to the instruction as given and of any request below of an instruction in the terms urged by appellant before this Court, a timely request for such instructions would properly be rejected by the trial court as irrelevant to the question of whether an individual's state of intoxication was such that he was unable to formulate the specific mental element required for conviction of a crime such as robbery.

In *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 131, 259 F.2d 943, 946 (1958), *cert. denied*, 359 U.S. 959 (1959), this Court clearly set forth the relationship between a defendant's alleged state of intoxication and the specific intent required in crimes such as robbery:

> Drunkenness is not per se an excuse for crime, but nevertheless it may in many instances be relevant to the issue of intent. One class of cases where drunkenness may be relevant on the issue of intent is the category of crimes where specific intent is required. Robbery falls into this category, and a defendant accused of robbery is entitled to an instruction on drunkenness as bearing on intent if the evidentiary groundwork has been adequately laid. Such an instruction is necessary, however, only if sufficient evidence on the intoxication issue has been introduced so that a reasonable man could possibly entertain a doubt therefrom that the accused *was able to form the necessary intent.* (Emphasis added.)

Indeed in that case, where the facts were similar to this case, the Court held that the intoxication instruction was not required:

> Appellant's careful advance preparation for the crime, before boarding the cab, by filling a sock with gravel to use as an efficient but silent weapon with which to render the cab driver helpless, the rifling of his pockets and taking of his wallet show that appellant's mind was working logically, rationally and efficiently to the execution of his criminal purpose. We might add to that the not insignificant fact that the seating arrangement, with [co-defendant] Brennen in the front seat ready to apply the brake, and appellant in the rear seat where he could more readily use his "sandbag" on the victim, like the other carefully calculated steps, including prompt flight, is not the work of a man *so intoxicated as to be unable to form the intent to rob. Id.* at 132, 259 F.2d at 947. (Emphasis added.)

In other words the issue is whether there was substantial evidence tending to show that at the time of the offense "appellant was *too drunk* to form the requisite intent to rob." *Womack* v. *United States*, 119 U.S. App. D.C. 41, 336 F.2d 959 (1964).

Therefore, the only relevant consideration with respect to specific intent is the "degree" of appellant's intoxica-

tion at the time of the offense, not its origin or his ability to control or refrain from drinking alcoholic beverages. The mere fact that appellant has been classified or "labeled" a "chronic alcoholic" for purposes of treatment under 24 D.C. Code § 501, *et seq.* or exculpation for public intoxication pursuant to *Easter* v. *District of Columbia*, 124 U.S. App. D.C. 33, 361 F.2d 50 (1966), is of no particular significance in determining whether appellant was "so intoxicated as to be unable to form the intent to rob."

Indeed the distinction between the availability of the defense of intoxication in a specific intent crime and the exclusion of that defense in a general intent crime, except insofar as intoxication is relevant to the question of criminal responsibility under the *Durham-McDonald* rule,[1] has been preserved in this jurisdiction despite the classification of the condition of an inebriated chronic alcoholic as "involuntary intoxication."[2] *(Francina) King* v. *United*

---

[1] *Durham* v. *United States*, 94 U.S. App. D.C. 228, 241, 214 F.2d 862, 874-75 (1954); *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 124, 312 F.2d 847, 851 (*en banc* 1962).

[2] Appellant has confused the issue of whether an individual who is involuntarily intoxicated may be excused from responsibility for a crime committed while in that state and the completely separate issue of whether someone is so intoxicated, regardless of his choice in the matter, that he is unable to form a specific intent necessary for a particular crime.

Even the recent proposals in this area by the American Law Institute, Model Penal Code, § 2.08 (Proposed Official Draft, 1962) would preserve the distinction between intoxication which is to such a degree that "it negatives an element of the offense," and the categories of "not self-induced" and "pathological" intoxication. These latter terms, though substituted for the traditional term "involuntary intoxication," are limited to intoxication caused by fraud, duress, a choice between evils, the unknowing taking of an intoxicant or an unanticipated gross reaction to intoxicants knowingly imbibed.

However, those who come within these terms will be excused for criminal conduct only "if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law." Section 2.08(4). In other words, such

States, 125 U.S. App. D.C. 318, 323, 332, 372 F.2d 383, 388, 397 (1967); *Parker* v. *United States*, 123 U.S. App. D.C. 343, 346 n.4, n.5, 359 F.2d 1009, 1012 n.4, n.5. (1966).

Hence, the fact that *Easter* stated that a person who is "unable to control his use of alcoholic beverages is not to be considered voluntarily intoxicated," *supra* at 36, 361 F.2d at 53, does not require a special instruction importing extraordinary legal significance to this classification where the introduction in evidence of the fact of appellant's adjudication as a chronic alcoholic, by itself, had little, if any, probative significance in establishing appellant's actual inability to formulate the intent to rob.

In fact, it is likely that the "tolerance" for alcohol built up in an individual who has reached the point where he can no longer control his drinking and is in essence addicted to alcohol, would, like the tolerance of a narcotics addict, permit the alcoholic to consume considerably

---

intoxication excuses "only if the resulting incapacitation is as extreme as that which would establish irresponsibility had it resulted from mental disease" under the A.L.I. standard of responsibility, Model Penal Code, § 4.01. Section 2.08, comment (Tent. Draft No. 9, 1959).

Chronic alcoholism as defined in 24 D.C. Code § 501 would not appear to fall within the terms of "self-induced" or "pathological" intoxication, and Section 2.08(3) and accompanying comments (Tent. Draft No. 9) unequivocally state that "intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01." Where the issue of responsibility is raised, evidence of the defendant's propensity for drinking "becomes part of the total picture of the disease * * *." See *United States* v. *Malafronte*, 357 F.2d 629, 632 n.8 (2d Cir. 1966).

In this jurisdiction, a closely analagous test has been established under the so-called *Durham-McDonald* standard of criminal responsibility. It is appellee's position that the chronic alcoholic must satisfy the requirements of that standard with its broadened scope of inquiry when accused of crime other than public intoxication before the question of criminal responsibility is presented to the jury. The mere showing of an adjudication of chronic alcoholism for treatment purposes and some relationship to the crime charged, the test urged here by appellant, would be insufficient to raise this issue. Our position is more thoroughly amplified in part III of this Argument.

larger amounts of alcohol than the so-called "voluntary drinker," with the effect of the alcohol on the cognitive abilities of the alcoholic being considerably less than the effect of a similar amount on the voluntary drinker. *Alcoholism*, Public Health Service Pub. No. 730, National Institute of Mental Health, U.S. Department of Health, Education and Welfare, at 2-3 (Rev. 1963), quoted in *Easter* v. *District of Columbia*, *supra* at 41, 361 F.2d at 58; see Bowman, *Narcotics Addiction and Criminal Responsibility under Durham*, 53 Geo. L.J. 1017, 1038-40 (1965). Furthermore, as in the case of the narcotics addict, the alcoholic is more likely to conduct himself with a higher degree of " 'rational, reasonable, coherent and normal behavior' " when he had been drinking than when he has stopped drinking or run out of his supply and begins to experience the symptoms of withdrawal leading to delerium tremens. See *Gaskins* v. *United States*, No. 20,252, D.C. Cir., December 20, 1967 at 5 n.16; *Alcoholism*, *supra*.

In particular, the facts in this case clearly show that despite appellant's inability to control his drinking, whatever amount of alcohol he consumed up to the time of the robbery and three hours later at his arrest did not materially interfere with his ability to plan and carry out the necessary steps involved in the robbery of James Walker with the degree of consciousness necessary to formulate the intent to steal.

Accepting appellant's testimony that he had been drinking for two or three weeks prior to August 16, 1966 and had had "quite a few" drinks that night, nevertheless when he approached Walker in the park with the smell of alcohol on his breath he did not appear to be drunk (Tr. 19). He was certainly able to carry on what on the surface appeared to be a friendly conversation with Walker. In reality appellant's questions were carefully designed to elicit from Walker the vital information which made him a good risk as a robbery victim. By determining that Walker was not from the District and that he was only here on a short layover awaiting a bus which

would take him to Virginia Beach within a few hours, appellants knew that the likelihood was slim that Walker, if robbed in the manner they had planned, would complain to the police or be available to testify against them. Of course, they could not anticipate that Walker would take up residence in the District after this offense.

Moreover, the positions appellants placed themselves in, with Salzman on the bench next to Walker and Lowery standing over him with the bottle in his hand, were clearly designed to prevent their victim from attempting to flee or do anything but cooperate with them to avoid serious injury to himself. Certainly the drink Salzman took from his accomplice's wine bottle did not impair his ability to consciously remove Walker's money from his wallet, which was returned to Walker because of the danger of identification if caught therewith, and to demand his victim's other valuables, namely the watch and rings. Thereafter, appellant clearly revealed the calculated plan which he and Lowery had been consciously carrying out when he warned Walker to "get back on the bus and go home and * * * forget all about this" (Tr. 10-A, 16-18), and coolly, in a normal manner, walked away (Tr. 19).

An hour later, although appellant was in possession of another bottle of wine, an experienced police officer noticed only a "slight odor of alcohol" on Salzman's breath and did not feel appellant was so intoxicated as to be arrested for public drunkenness (Tr. 97-98, 103-04). Finally, two hours later, at approximately 4:00 a.m., when appellant was arrested for public intoxication and apparently had consumed more alcohol since his earlier encounter with the arresting officer, Salzman was still sufficiently aware of what he was doing and of the significance of his situation to attempt to conceal the incriminating stolen ring before it was discovered on his person at the precinct.

This evidence convincingly demonstrates that appellant was not so intoxicated as to be unable to form the intent to steal, notwithstanding his inability to control his drinking. *Heideman* v. *United States*, *supra*. Hence, instruc-

tions of law which focused on the distinction between voluntary and involuntary intoxication and whether the robbery was the product of chronic alcoholism, instructions which were not requested by appellant below, would have no particular relevance in aiding the jury in its determination of whether appellant was intoxicated to the degree necessary to preclude his forming the specific intent to steal, the only question raised by appellant as a defense to this crime.

Therefore, the failure of the trial judge to instruct on the element of specific intent in the terms suggested for the first time by appellant in this appeal was not error and especially not plain error affecting substantial rights. Rule 52(b), Fed. R. Crim. P.; *Scurry* v. *United States*, 120 U.S. App. D.C. 374, 347 F.2d 468 (1965).

II. Appellant Salzman may not claim for the first time on appeal that the trial court erred in failing to instruct the jury it should consider whether the robbery was a product of chronic alcoholism where no such evidence was either proffered or introduced and no such instruction was requested below with respect to either specific intent or criminal responsibility.

The only evidence introduced at trial with respect to Salzman's state of intoxication at the time of this offense was appellant's own testimony about his drinking during this period and his numerous arrests for public intoxication, the government's witnesses' impressions of appellant's state of sobriety, and Mrs. Gardner's testimony of the fact of appellant's adjudication as a chronic alcoholic which meant he could not control his drinking and which excused him solely from conviction for public intoxication. Appellant's express purpose of introducing his testimony and that of Mrs. Gardner, as illustrated in his counsel's opening and closing statements and requests for instructions, was to attempt to establish that appellant was too drunk to form the intent to steal.

No attempt was made by appellant to establish, either through lay, expert, or documentary evidence, that alco-

holism and/or some underlying mental disease or defect substantially affected his mental or emotional processes and substantially impaired his behavioral controls in other ways besides his inability to control his drinking. Nor did appellant attempt to introduce any evidence concerning the relationship, if any, between his alcoholism and/or mental disease and the robbery charge.

Hence, there was no factual foundation upon which the trial court could have instructed along the lines urged for the first time by appellant on appeal either with respect to intoxication and specific intent, which was in issue, or concerning the question of criminal responsibility, which was not raised below. *Smith and Cunningham* v. *United States*, 122 U.S. App. D.C. 300, 305, 353 F.2d 838, 843 (1965).

Finally, appellant's trial counsel expressly concurred in the trial court's instruction which dealt with the relationship between intoxication and specific intent although he was given ample opportunity both before and after the court charged the jury to object. No request was ever made that the court include in its charge on specific intent or otherwise the question of whether the crime was a product of chronic alcoholism. Appellant is therefore precluded from complaining for the first time on appeal that the trial court did not give an instruction which he did not request, particularly where he was given ample opportunity to make such a request but instead expressly concurred in the charge as given by the court. Rule 30, Fed. R. Crim. P.; *Osborn* v. *United States*, 385 U.S. 323, 332 n.11 (1966); *Gaskins* v. *United States*, *supra* at 9, n.30; *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966).

III. This Court should not establish a rule of criminal responsibility limited to a particular illness classified as such for treatment purposes, such as "chronic alcoholism," which rule would be in conflict with the *Durham-McDonald* rule, the exclusive test for criminal responsibility in this jurisdiction.

Assuming *arguendo* that this case appropriately presents on appeal the question of what rule of criminal responsibility should be applied to a defendant charged with a crime other than public intoxication who timely claims not to be responsible for his conduct because he has been adjudicated or qualifies as a "chronic alcoholic" within the meaning of 24 D.C. Code § 501 and the *Easter* decision,[3] appellee submits that the standards set forth in the *Durham-McDonald* rule, the exclusive test for criminal responsibility in this jurisdiction, are adequate and particularly designed for determining the "blameworthiness" of such individuals. *Washington* v. *United States*, No. 20,232, D.C. Cir., December 13, 1967, at 17; *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 124, 312 F.2d 847, 851 (*en banc* 1962); *Durham* v. *United States*, 94 U.S. App. D.C. 228, 242, 214 F.2d 862, 876 (1954); *Holloway* v. *United States*, 80 U.S. App. D.C. 3, 148 F.2d 665 (1945).

In order to demonstrate the soundness of appellee's position a careful analysis of the history and development

---

[3] While appellant appears to ask this Court to engraft considerations of whether a crime is a product of chronic alcoholism to the element of specific intent (Brief for Appellant at 19-25), appellee interprets this position as a tacit admission that the question of criminal responsibility was not presented below; moreover in Part I of this Argument we have endeavored to demonstrate that the questions as to whether a crime is causally related to a particular affliction are irrelevant to the issue of whether appellant was too intoxicated to form the intent to steal. In reality, what appellant is seeking is a new trial where the sole issue of responsibility would be "1. Whether the Appellant Salzman was a chronic alcoholic at the time of the alleged commission of the act of robbery by him, and if so, 2. Whether the acts he was charged with were a product of his chronic alcoholism or arose out of that state." (Brief for Appellant at 25-26.)

of the rule on criminal responsibility in this jurisdiction is required.

The exclusive test of criminal responsibility in the District of Columbia is the standard adopted in *Durham* v. *United States, supra* and further defined in *McDonald* v. *United States, supra.* "In this jurisdiction, the ultimate issue of responsibility is whether the criminal act is the product of a mental disease or defect." *Misenheimer* v. *United States,* 106 U.S. App. D.C. 220, 271 F.2d 486 (1959); *Durham* v. *United States, supra* at 241, 214 F.2d at 875. This is "the only ultimate test of criminal responsibility in this Circuit." *Blocker III* v. *United States,* 116 U.S. App. D.C. 78, 80, 320 F.2d 800, 802 (1963).

In *Durham,* this Court rejected the existing "exclusive" tests for responsibility, the so-called right-wrong test as refined by the *M'Naghten* rule[4] and the Irresistible Impulse test adopted in 1929 as a supplement to the *M'Naghten* rule.[5] 94 U.S. App. D.C. at 235-36, 214 F.2d at 869-70. The Court's criticism of the *M'Naghten* rule was that it unduly narrowed the scope of inquiry to but one symptom of mental illness:

> The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon any particular symptom. * * * In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines.
>
> * * * *

---

[4] 10 C. and F. 200, 210, 8 Eng. Rep. 718, 722 (1843):

> * * * to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

[5] *Smith* v. *United States,* 59 U.S. App. D.C. 144, 30 F.2d 548 (1929).

> We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. *Id.* at 239, 240, 214 F.2d at 873, 874.[6]

For these reasons the Court concluded that "a broader test should be adopted," and decreed that thereafter "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 240, 241, 214 F.2d at 874, 875.

The Court stressed that upon a claim of criminal irresponsibility the jury should not be required to rely on arbitrarily selected "symptoms, phases, or manifestations" as criteria for determining the ultimate question of fact upon which such a claim depends. Testimony as to such "symptoms, phases, and manifestations," along with other available relevant evidence designed to present the jury with the entire mental makeup of the accused should be considered by the jury "upon the ultimate questions of fact which it alone can finally determine." *Id.* at 242, 214 F.2d at 876. In other words, "the jury's range of inquiry is not to be limited to particular symptoms, but may include, under proper instructions, any symptoms and manifestations of mental disorder." *Misenheimer* v. *United States, supra; Campbell* v. *United States*, 113 U.S. App. D.C. 260, 263, 307 F.2d 597, 600 (1962). Nor are considerations under the older tests to be excluded, such as whether the defendant could appreciate the wrongfulness of his act or acted under the compulsion of an irresistible impulse, "provided that the Durham decision is followed in [the trial court's] definition of the ultimate jury question to be decided." *Douglas* v. *United States*, 99 U.S. App. D.C. 232, 240, 239 F.2d 52, 60 (1956); *Durham* v. *United States, supra* at 242, 214 F.2d at 876; *Misen-*

---

[6] The irresistible impulse test was also rejected as inadequate because it did not recognize mental illness which was characterized by brooding or reflection. 94 U.S. App. D.C. at 240, 214 F.2d at 874.

heimer v. *United States, supra; McDonald* v. *United States, supra* at 124-25, 312 F.2d at 851-52; *Blocker III* v. *United States, supra.* See Bowman, *Narcotic Addiction and Criminal Responsibility under Durham*, 53 Geo. L.J. 1017, 1021-22, 1027 n.49 (1965).

It soon became clear, however, that rather than expanding the scope of inquiry to particular facts concerning the accused's mental and emotional makeup, *Durham*, as it was being applied, was resulting in whatever psychiatric experts "labeled" as mental disease being substituted for the jury's determination of the ultimate question based on the facts supporting the expert's opinion. Instead of freeing the problem of responsibility from labels, the rule as it was applied became more entangled with labels than before. See *Blocker II* v. *United States*, 110 U.S. App. D.C. 41, 50, 288 F.2d 853, 862 (*en banc* 1961) (concurring opinion). The crux of the problem was recently summarized by Chief Judge Bazelon in *Washington* v. *United States, supra* at 3:

> This purpose was not fully achieved, largely because many people thought *Durham* was only an attempt to identify a clearly defined category of persons —those classified as mentally ill by the medical profession—and excuse them from criminal responsibility. *In fact, the medical profession has no such clearly defined category*, and *the classifications it has developed for purposes of treatment, commitment, etc. may be inappropriate for assessing responsibility in criminal cases.* Since these classifications were familiar, however, may psychiatrists understandably used them in court despite their unsuitability. And some psychiatrists, perhaps unwittingly, permitted their own notions about blame to determine whether the term mental illness should be limited to psychoses, should include serious behavior disorders, or should include virtually all mental abnormalities. * * * (Emphasis added.)

Not long after *Durham* was decided, this Court, in *Carter* v. *United States*, 102 U.S. App. D.C. 227, 236, 252

F.2d 608, 617 (1957), re-emphasized that it was the dynamics of the defendant's mental condition, not its label, that was important:

> To make a reasonable inference concerning the relationship between a disease and a certain act, the trier of facts must be informed with some particularity. This must be done by testimony. *Unexplained medical labels—schizophrenia, paranoia, psychosis, neurosis, psychopathy—are not enough.* Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; *in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant;* it does not lie in his mere expression of conclusion. (Emphasis added.)

See *Washington* v. *United States*, *supra* at 13-14.

The Court made it very clear that "the law has no separate concept of a legally acceptable ailment which *per se* excuses the sufferer from criminal liability" for otherwise criminal conduct. *Carter* v. *United States*, *supra*. See *Hawkins* v. *United States*, 114 U.S. App. D.C. 44, 47 n.11, 13, 310 F.2d 849, 852 n.11, 13 (1962).

The persistent problem of the "trial by label" in which psychiatrists were allowed to testify in conclusory terms as to what they considered to be the "product" of "mental disease," the ultimate issue in an insanity trial, was severely criticized in a dissenting opinion by Circuit Judge Burger in *Campbell* v. *United States*, *supra* at 266-79, 307 F.2d at 603-16. See also *Blocker II* v. *United States*, *supra* (Burger, J., concurring).[7] In *Campbell*, as a re-

[7] Both Judge Burger's opinions in *Blocker II* and *Campbell* were cited, and the latter quoted extensively, with approval by Chief Judge Bazelon in his recent majority opinion in *Washington* v. *United States*, *supra* at 18 n.30, 20 n.31.

sult of a weekend conference at St. Elizabeth's Hospital held during an earlier proceeding, *In re Rosenfield*, 157 F.Supp. 18 (D.C.D.C. 1957), the hospital staff had determined as a matter of administrative policy to henceforth consider personality disorders such as those diagnosed as "sociopathic personality disturbance, alcohol addiction" (*Blocker II* and *III*) or "emotionally unstable personality" *(Campbell)* as mental diseases instead of the hospital's previous non-disease classification for these diagnoses. See *Blocker II* v. *United States*, *supra* at 48-49, 288 F.2d at 860-61 (concurring opinion). The dissenting judge criticized the majority opinion as holding in essence that "[*Durham*] ends the inquiry once [disease and causality] are established. This clearly implies that . . . disease and causality may be found to exist despite concurrent proof that the defendant had capacity to refrain from doing the act." *Campbell* v. *United States*, *supra* at 269 n.8, 307 F.2d at 606 n.8.

As applied to this case, such a rule would require a mere showing that appellant suffered from "chronic alcoholism," however that term is defined, and some causal connection to this crime in order to exculpate him, essentially the standard sought by appellant in this appeal. However, the effect of such a ruling, as cogently pointed out by the dissenting judge, would be to remove the determination of criminal responsibility from the hands of the jury and place it in the laps of psychiatrists, whose findings of mental disease for administrative, clinical, and professional purposes and the inevitable causal connection to any crime, would exculpate defendants without a jury determination of whether the individual was able to control his behavior despite his abnormal mental condition.

The inherent conflict between such a position and the purposes of the *Durham* rule was apparent:

> The pernicious practice of allowing the conclusion opinions on "product" by experts, apart from its other vices, has operated to *narrow* and constrict the scope of psychiatric testimony when what we want

> is to *broaden* that scope. * * * The function of the psychiatrist is not to try to tell the jurors what verdict they should render but rather to portray, as fully and completely as possible, the mental and emotional makeup of the defendant, how his emotional and intellectual processes work and how they affected his capacity to control his conduct, both generally and in the specific situation surrounding the crime charged. They should try to portray the "inner man" as best they can without fanciful speculation. *Id.* at 276-77, 307 F.2d at 613-14 (quoted with approval in *Washington* v. *United States*, *supra* at 20 n.31).

To remedy this situation, Judge Burger proposed a change in the rule of criminal responsibility to require the jury to be instructed as follows:

> The terms mental disease and mental defect as the law uses them are broad terms by which we intend to describe any abnormal mental condition which substantially impairs mental or emotional processes of the defendant to the point where it substantially or seriously disturbs the conduct or behavior of the defendant or his ability to control his conduct or behavior. *Id.* at 279, 307 F.2d at 616.

Shortly thereafter, the above proposal was substantially adopted by this Court *en banc*. In *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 123-24, 312 F.2d 847, 850-51 (1962), the Court "decided to give mental illness a legal definition independent of its medical meaning." *Washington* v. *United States*, *supra* at 3, 14. Henceforth, the term "mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls." *McDonald* v. *United States*, *supra*.

The express purpose of adopting this rule was

> to make it very clear that neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect. What

> psychiatrists may consider a "mental disease or defect" for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. *Ibid.*[8]

Following *McDonald*, and both before and after the *Easter* decision, this Court has continued to emphasize that trial courts when instructing on an appropriately presented issue of criminal responsibility "should avoid any implication that the accused's responsibility turns exclusively on the label attached to his condition by the medical profession or the authors of diagnostic manuals." [9] *Blocker III* v. *United States*, *supra;* and see *Washington* v. *United States*, *supra* at 16; *Henderson* v. *United States*, 123 U.S. App. D.C. 380, 384-86, 360 F.2d 514, 518-20 (1966) (concurring opinion); *Rollerson* v. *United States*, 119 U.S. App. D.C. 400, 343 F.2d 269 (1964); *Castle* v. *United States*, 120 U.S. App. D.C. 398, 402, 347 F.2d 492, 496 (1964) (concurring opinion), *cert. denied*, 381 U.S. 929 (1965).

Only last month, in *Washington* v. *United States*, *supra* at 5, this Court expressed deep concern with the "persistent use of labels" and the "paucity of meaningful information presented to the jury" on the issue of criminal responsibility despite its frequent demands for more meaningful testimony. "Too often," the Court said, "conclusory labels—both medical and legal—have substituted, albeit unwittingly, for the facts and analysis which underlie them." *Id.* at 16.

To control this undesirable situation the Court has instructed the trial court to "limit the psychiatrists' use of

---

[8] Significantly, in *McDonald* this Court noted that evidence of the defendant's I.Q. rating of 68, without more, would not be sufficient evidence of a mental defect to require a jury determination of whether the government had established the defendant's criminal responsibility beyond a reasonable doubt.

[9] "There is at present no formal definition of alcoholism or of an alcoholic which is universally or even widely accepted." *Alcohol and Alcoholism*, NIMH, Public Health Service Pub. No. 1640 at 6 (1967).

medical labels—schizophrenia, neurosis, etc." [10] and to insure that their meaning is explained to the jury "in a way which relates their meaning to the defendant." *Id.* at 18.[11] Furthermore, psychiatrists will no longer be permitted to render opinions in terms of the ultimate issue of whether the act was a "product" of the defendant's mental condition. "Psychiatrists should explain how defendant's disease or defect relates to his alleged offense, that is, how the development, adaption and functioning of defendant's behavioral processes may have influenced his conduct. But psychiatrists should not speak directly in terms of "product," or even "result" or "cause." *Id.* at 20-21.

Of particular relevance to this case, in which appellant is seeking to establish the classification of chronic alcoholism for treatment under the District of Columbia Rehabilitation of Alcoholics Act, 24 D.C. Code §§ 501, 502, as a separate test of responsibility, is the Court's requirement that before the expert testifies he be instructed by the trial court that "there are considerations which may be relevant in other proceedings or in other contexts which are not relevant here; for example, how the defendant's condition might change, or whether he needs treatment, or is treatable, or dangerous, or whether there are adequate hospital facilities, or whether commitment would be best for him, or best for society." *Id.* at 25.

It is in this context that appellant's proposed test of responsibility for the chronic alcoholic must be examined.

---

[10] We presume that this "etc." includes such labels as "chronic alcoholism" and "narcotic addiction." See *Castle* v. *United States*, *supra* at 402-03, 347 F.2d at 496-97 (concurring opinion).

[11] The Court considered discarding the *Durham-McDonald* rule and its use of the phrase "mental disease and defect" and making the ultimate test of responsibility "whether or not it is just to blame the defendant for his act." However, noting that it was "unaware of any test for criminal responsibility which does not focus on the term 'mental illness,' or some closely similar term," the Court determined not to abandon its *Durham-McDonald* formula at this time. No. 20,232 at 15 n.23.

Merely stating the proposition that a defendant should be relieved of blame, if his criminal act was the product of chronic alcoholism, illustrates the irreconcilable conflict between such a rule of law and both the language and purposes of the *Durham-McDonald* standard. If all that is relevant is whether appellant had been adjudicated or qualifies as a chronic alcoholic however that is defined for treatment purposes, then the evidence necessary to establish that fact could be limited to a certified copy of his adjudication in the Court of General Sessions or his admission to an alcoholic clinic as a chronic alcoholic for treatment. 24 D.C. Code §§ 504, 510. If that is the case, however, all this Court has said about the elimination of the use of labels as criteria for determining responsibility, and the need for testimony concerning the dynamics of a defendant's mental condition in relation to his mental and emotional processes and ability to control his behavior will have been for naught. Such considerations would be irrelevant under the proposed standard. In essence, the label "chronic alcoholism" will have been elevated to a rule of law.

Neither the Rehabilitation of Alcoholics Act nor the *Easter* decision supports appellant's position. The purpose of the Act is "to establish a program for the rehabilitation of alcoholics * * * and to substitute for jail sentences for drunkenness medical and other scientific methods of treatment which will benefit the individual involved and more fully protect the public." 24 D.C. Code § 501. *Easter* v. *United States*, *supra* at 34-35, n. 4, 361 F.2d at 51-52, n. 4. In the only portion of the *Easter* opinion concurred in by a majority of the Court sitting *en banc*, the intention of Congress gleaned from this Act was that "the chronic alcoholic be subjected to civil processes when found intoxicated in public, rather than convicted as a criminal" of such a charge. On this basis, the Court held that "chronic alcoholism is a defense to a charge of public intoxication and, therefore, is not a crime." *Id.* at 34, n.2, 361 F.2d at 51, n.2. The opinion made it clear that the Act did not equate chronic alcoholism with mental dis-

ease for purposes of the insanity defense. *Id.* at 35, 361 F.2d at 52. Finally, in his concurring opinion, Circuit Judge Danaher, joined by Circuit Judges Burger and Tamm, stated his confidence "that Congress in its obvious purpose of seeking means for accomplishing the possible rehabilitation of the unfortunate victims of alcoholism had no thought whatever of addressing itself to some revised standards for determining criminal responsibility as to yet other crimes than public drunkenness. I wish to note my complete understanding that we are not now doing so. * * *" *Id.* at 44, 361 F.2d at 61.

Robinson v. *California*, 370 U.S. 660 (1962), and *Driver* v. *Hinnant*, 356 F.2d 761 (4th Cir. 1966), relied on by only four judges on the *Easter* panel, also lend no support to appellant's position. *Robinson* held that a statute which made the "status" of narcotics addiction a crime inflicts cruel and unusual punishment in violation of the United States Constitution. 370 U.S. at 666-67. *Driver*, relying on *Robinson*, held that punishing a chronic alcoholic who could not control his drinking for public intoxication amounted to punishing an "involuntary symptom of a status," which would also amount to cruel and unusual punishment. 356 F.2d 764-65. It would be no different from punishing an epileptic for having a seizure in public or a hemophiliac for bleeding in public.

Recently, in discussing the impact of *Robinson* on the problem of narcotics addiction and criminal responsibility, this Court noted that by accepting the fact that the status of narcotic addition was an "illness" which by itself could not be punished as a crime, "did not in any sense intimate a view that the [Supreme] Court considered narcotics addiction a *mental* illness in the criminal responsibility context." *Heard* v. *United States*, 121 U.S. App. D.C. 37, 38 n.3, 348 F.2d 43, 44 n.3 (1964). (Emphasis by this Court.) See *Hutcherson* v. *United States*, 120 U.S. App. D.C. 274, 280, 345 F.2d 964, 970 (concurring opinion), *cert. denied*, 382 U.S. 894 (1965). "Discussion of addiction as a mental illness in a broad social context or for treatment purposes is quite a different matter from

labeling addiction 'mental disease' in the context of determining criminal responsibility." *Heard* v. *United States*, *supra* at 40 n.7, 348 F.2d at 46 n.7.

Similarly, the *Easter* opinion explicitly stated that by defining chronic alcoholism as a " 'sickness,' " Congress was not equating that term with "mental disease" in the insanity context. 124 U.S. App. D.C. at 35, 361 F.2d at 52. See *Castle* v. *United States*, *supra* at 401, 402, 347 F.2d at 495, 496 (concurring opinion).

In two recent concurring opinions preceding *Easter*, Circuit Judge Burger pointed out that while "drug addiction or alcohol addiction" are not punishable as crimes under *Robinson*, these terms are not to be equated with " 'mental disease' or 'insanity' in the context of determining criminal responsibility. * * * The core of the problem since our McDonald holding is not one of labels whether 'disease' or 'addiction' but whether an abnormal condition of the mind has substantially impaired the accused's capacity to control his behavior." *Castle* v. *United States*, *supra* at 402, 403, 347 F.2d at 496, 497. Therefore, it follows that "the proper procedure is for the accused to raise the issue of 'insanity' grounded on addiction before the trier of fact by 'some evidence' that he has some mental illness apart from addiction or that addiction to and long or intensive use of narcotics have eroded and impaired his capacity to control his conduct." *Hutcherson* v. *United States*, *supra*.

This, of course, has been the approach of this Court in the area of narcotics addiction and criminal responsibility. *Gaskins* v. *United States*, *supra* at 2-3, n.6 (citing the concurring opinions in *Castle* and *Hutcherson*, *supra*, with approval); *Heard* v. *United States*, *supra*, at 38, 348 F.2d at 44. In *Gaskins*, decided December 20, 1967, the relationship between drug addiction and the insanity defense was stated as follows:

> Our decisions also define boundaries within which the interplay of drug addition is confined. The fact of addiction standing alone, does not permit a finding

> of mental disease or defect. Evidence of that fact, however, has probative value in conjunction with evidence of mental illness, and the effect of a deprivation of narcotics on behaviorial controls is a relevant circumstance. We have recognized, too, that extensive and protracted addiction may so deteriorate such controls as to produce irresponsibility within our insanity test. *But we have also made it plain that although a narcotic habit is causally connected with the crime, the defense is negated if the power of self-restraint is not diminished significantly.* No. 20,252, *supra* at 3. (Emphasis added.)

No reason appears why a different approach to the problem of alcoholism and criminal responsibility would be warranted. In fact, both before and after the *Easter* decision, this Court has treated the interplay of varying degrees of alcoholism and mental illness within the framework of the *Durham-McDonald* rule. *Blocker III* v. *United States*, *supra* (diagnosis: sociopathic personality disturbance, alcohol addiction); *(Francina) King* v. *United States*, *supra* at 320, 333, 372 F.2d at 385, 398 (diagnosis: passive-aggressive personality with organic and alcoholic features). In the Second Circuit, which recently adopted the A.L.I. test of responsibility,[12] the approach has been in accord with this Court's rulings. *United States* v. *Freeman*, 357 F.2d 606 (1966) (narcotics addiction); *United States* v. *Malafronte*, 357 F.2d 629 (1966) (chronic alcoholism). While adopting the A.L.I. test, for the same reasons this Court earlier discarded the

---

[12] A.L.I., Model Penal Code, Section 4.01 provides:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

United States v. *Freeman*, 357 F.2d 606, 622 (2d Cir. 1966). For a comparison between the A.L.I. test and the *Durham-McDonald* rule which concludes that in practice there is no substantive difference between these tests, see *Bowman*, *supra* at 1027-28; *United States* v. *Freeman*, *supra* at 621-22, n.51.

M'Naghten rule, *United States* v. *Freeman*, *supra* at 615-25, the Second Circuit made it quite clear that neither narcotic addiction nor chronic alcoholism, without more, would be considered a sufficient showing of "disease or defect of the mind" to raise a jury question of criminal responsibility under the A.L.I. standard. *Id.* at 625; *United States* v. *Malafronte*, *supra* at 632 n.8.

Appellee submits that to do otherwise and adopt appellant's position would be equivalent to elevating a label such as chronic alcoholism to a rule of law, something this Court has been striving for over thirteen years since *Durham* to avoid. We agree with appellant that to accept his proposed standard "would not be a revolutionary step" (Brief for Appellant at 25)—we submit, however, that it would be an unwise and unnecessary step backwards.[13]

IV. The prosecutor's closing argument contained no misstatements of fact concerning appellant Lowery's shirt nor any conclusions therefrom beyond the bounds of proper advocacy, and in any event, his statements were not so prejudicial that they amount to plain error affecting substantial rights.

(Tr. 14, 34, 71, 85-86, 90-91, 202, 222-24, 226-27)

Appellant Lowery contends that the prosecutor's closing arguments contained misstatements of fact concerning

---

[13] In this case, only the fact of appellant's adjudication as a chronic alcoholic under the Rehabilitation of Alcoholics Act was in evidence without any additional evidence proffered or introduced to establish the relationship between this condition and any abnormal condition of the mind which may have affected appellant's mental or emotional processes and impaired his behavioral controls with respect to the robbery. *McDonald* v. *United States*, *supra*. Hence, there was no basis for a jury instruction on criminal responsibility, particularly where no such instruction was sought by appellant below. *Ibid; Gaskins* v. *United States*, *supra; Smith and Cunningham* v. *United States*, *supra; Heard* v. *United States*, *supra*. Certainly, this is not a case where it could be said that the trial judge abused his discretion in not raising the insanity defense for appellant. *Cross II* v. *United States*, No. 20,572, D.C. Cir., January 9, 1968; *Smith and Cunningham* v. *United States*, *supra; Whalem* v. *United States*, 120 U.S. App. D.C. 331, 337-38, 346 F.2d 812, 818-19 (*en banc* 1965).

Lowery's shirt and improper conclusions concerning the disappearance of the shirt so as to prejudice the jury against appellant. Appellee submits that the prosecutor's summation was amply supported by the evidence of record and that his conclusion therefrom in accordance with the unobjected to ruling of the trial court was within the permissible bounds of advocacy. In any event, his statements were not so prejudicial as to constitute plain error.

The complainant Walker testified that "Lowery had on a white short-sleeved shirt with a blue band around the collar" (Tr. 14), at the time of the robbery. Detective Butler testified that he interviewed Lowery at the hospital at about 2:00 a.m. Lowery claimed to have been robbed and cut in the same park "at the same time, approximately 1:00 a.m." (Tr. 88) as Walker. At the hospital appellant had a blood soaked "polo type shirt with a blue trimming * * * around the neck like a crew type shirt" (Tr. 85-86). In response to the prosecutor's question, "Did you make an inquiry of Mr. Lowery at that time about the white shirt with the blue trim on it?" Detective Butler answered:

> Yes. That was the one question that we wanted answered. We asked him where was his shirt and he stated that he left it at the hospital, and to the best of my recollection, and I am not sure of this, he left in a hospital gown, just upper part, and he had stopped at a hotel located in the 900 block of K—of New York Avenue, where a friend gave him another shirt, and he didn't have the shirt with him in the room, and he said he left it at the hospital.
>
> We checked the hospital later that morning and it wasn't there. We couldn't find the shirt that he had when he was originally cut. (Tr. 90-91).

Clearly, therefore, a substantial factual basis existed in the record from which the prosecutor could argue that the shirt worn by the man who held the broken wine bottle at Walker's throat and the shirt appellant claimed he left at the hospital were one and the same, thus corroborating Walker's strong identification of Lowery as one of his as-

sailants. Indeed it was never disputed below by appellant's counsel that this evidentiary inference existed. Furthermore, the inference that appellant deliberately disposed of his shirt to avoid its incriminating use against him, as argued by the prosecutor, was supported by Detective Butler's testimony that he was unable to locate appellant's shirt at the hospital, although appellant claimed he left it there. Notwithstanding the trial court's decision not to give an instruction on concealment, the prosecutor was not precluded from arguing the thrust of those facts in accordance with the unobjected to ruling of the trial court that he could do so (Tr. 202). The prosecutor's argument with the approval of the trial court and without objection by appellant either before, during or after its presentation certainly did not exceed the bounds of permissible advocacy.

In any event, if the trial court erred in permitting the government to make this argument, the error was minor in scope and clearly did not prejudice the jury against appellant in any significant way. First, the lack of any objection below is a strong indication that appellant did not consider the government's argument as depriving him of fair consideration by the jury of the issue of guilt or innocence. Indeed in his own argument, Lowery's counsel sought to capitalize on the government's position and gain the jury's sympathy by accusing the government of unfairly exploiting Lowery's unfortunate situation of having been cut and allegedly robbed in the same park as Walker (Tr. 222-24).

In so arguing, appellant's trial counsel himself clearly misstated the facts as supported by the evidence and so injected his own personal knowledge and beliefs into his argument as to be virtually testifying on appellant's behalf. For example, he stated that appellant had "had his *throat* cut in the park" (Tr. 222) (emphasis added), when the only evidence was that appellant had two lacerations on the *back* of his neck behind his ear (Tr. 34, 85). Counsel claimed that "Brooklyn * * * is a rather remote place," and that if Walker had said he'd visited "Man-

hattan where we all probably have been, you could have asked him a few questions about it and know whether or not he had been there, but Brooklyn, *I don't even know how to get across there*" (Tr. 226). (Emphasis added.) Finally, counsel stated, "Louisville, there is a race track there but he gave you no names," and compared Walker's testimony to that of "a con man, a forger" (Tr. 226-27).

Under the circumstances, we submit that appellant is in no position to claim prejudice from the government's arguments, which were based on evidence in the record, when appellant's own counsel did not so limit himself.

Moreover, any possible prejudice resulting from the prosecutor's argument was significantly alleviated by the relatively strong case against appellant, particularly in comparison to the virtual lack of any defense put on by appellant. *Corley* v. *United States*, 124 U.S. App. D.C. 351, 352, 365 F.2d 884, 885 (1966); *Cross I* v. *United States*, 122 U.S. App. D.C. 283, 285, 353 F.2d 454, 456 (1965); *(Kenneth) Jones* v. *United States*, 119 U.S. App. D.C. 213, 214 n.3, 338 F.2d 553, 554 n.3 (1964). Walker's positive identification of appellant was based on ample opportunity to observe appellant under circumstances which made mistake unlikely. As Walker testified, "Well he was the man that was holding the bottle to my throat. I was constantly staring right in his eyes, and right at the bottle, and that is a face that I won't never forget" (Tr. 71). Although the "uncorroborated testimony of a complainant is sufficient to support a verdict of guilty in a robbery case," *(Robert S.) Jones* v. *United States*, 124 U.S. App. D.C. 83, 85, 361 F.2d 537, 539 (1966), the similarity of Lowery's shirt to that of the robber holding the bottle and appellant's presence in the park at the time of Walker's robbery served to corroborate the victim's identification. This evidence, "if believed by the jury, constituted strong evidence of appellant's guilt." *Cross I* v. *United States, supra.*

In this case the prosecutor's statements could not have the effect, if erroneously believed by the jury, of wiping

out an insanity defense, *(Francina) King* v. *United States*, 125 U.S. App. D.C. 318, 324-32, 372 F.2d 383, 389-97 (1967), or a strong alibi defense, *Corley* v. *United States*, *supra*. At most it was intended to give weight to a minor portion of the government's proof against appellant. *Cross I* v. *United States*, *supra*. These factors plus appellant's lack of objection below and the trial court's instruction to the jury to rely solely on their own recollection of the evidence and not counsel's versions, are sufficient to discredit any claim of prejudice by appellant amounting to plain error affecting substantial rights. *Cross I* v. *United States*, *supra*.[14]

V. The trial court did not err in having pertinent testimony as it appeared in the transcript read to the jury in response to the jury's request for information.

(Tr. 248-50, 255)

In its note, the jury requested information pertaining to the time of the robbery of James Lowery in the park, the time that James Lowery was admitted at the hospital, and the time of the robbery of Walker. Both the prosecutor and appellant Lowery's counsel agreed that Walker testified he was robbed around 1:00 a.m., but Lowery's counsel was unable to recall whether there was evidence on the other two times (Tr. 248-49).

However, it is clear that all counsel agreed and the court specifically instructed the jury that "if those times are available in the *transcript*, and if there was *evidence* on the exact time, you are entitled to have that *evidence*" (Tr. 249-50). (Emphasis added.)

Thus, the jury was explicitly informed that the source of the information it would receive in answer to its inquiry, if available, would be the testimony in evidence as reflected by the reporter's notes. This fact was even

---

[14] See *Corley* v. *United States*, *supra* at 352 n.1, 365 F.2d at 885 n.1, for comparison between *Cross I* and *Corley* along the lines suggested above which would support affirmance in this case.

more evident when instead of the trial judge himself providing the answers, he had the court reporter read them from her notes. In response to the first question, the reporter informed the jury she was reading from the "direct examination by Mr. Owen of the witness Butler," and she read the question and the witness' answer as it appeared in her notes. In answer to the second question, the reporter stated, "There was no *testimony* with reference to that" (Tr. 255). (Emphasis added.)

There can be no question, therefore, that the jury received this information as part of the evidence before it for its consideration and not as established facts which they must accept as such. By proceeding in this manner, the trial court thus avoided making a "definite and concrete assertion of fact * * * with all the persuasiveness of judicial utterance." *Quercia* v. *United States*, 289 U.S. 466, 472 (1933). The fact that appellant's trial counsel did not request any clarifying instruction below along the lines appellate counsel now claims should have been given, Rule 30, Fed. R. Crim. P., is a strong indication that appellant was satisfied the trial court had not invaded the jury's fact-finding province in having testimony read to them from the reporter's notes.

Appellant's claim that Detective Butler's testimony should not have been read to the jury because it was based on hearsay, is not well founded. First, no objection was made on the grounds of hearsay when the officer rendered this testimony. Since the jury was presented with this evidence for its consideration before it sent out its note, there would be no sound reason for excluding this information after the note was received. Finally, Butler's testimony that Detective Muns informed him about a case that occurred in the park "at the same time, approximately 1:00 a.m.," as the one he had just investigated, namely Lowery's report, clearly was based on the information supplied by appellant when he reported his robbery. Since Lowery was obviously the source of the time of his alleged robbery, this testimony would have been admissible as an exception to the hearsay rule, even

if appellant had made a timely objection. Hence, the trial court did not abuse its discretion in allowing already admitted evidence to be read to the jury in response to its request.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM M. COHEN,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 288273 559

REPLY BRIEF FOR APPELLANT JAMES E. LOWERY

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,172 and 21,201

Frederick L. Salzman and James E. Lowery, Appellants,

v.

United States of America, Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Franklin M. Schultz
Robert M. Kennan, Jr.

888 17th Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant
(Appointed by this Court)

Of Counsel:

Purcell & Nelson
888 17th Street, N. W.
Washington, D. C. 20006

INDEX

TABLE OF CASES

---

* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREDERICK L. SALZMAN and JAMES E. LOWERY, Appellants, v. UNITED STATES OF AMERICA, Appellee.	Nos. 21,172 and 21,201

REPLY BRIEF FOR APPELLANT JAMES E. LOWERY

PRELIMINARY STATEMENT

Appellant Lowery urges this Court to reverse his conviction because his substantial rights were affected by (1) the prosecutor's misstatements of fact and unfounded conclusions in his closing argument to the jury and (2) the manner in which answers were provided to certain questions submitted by the jury after they commenced deliberations. The Government's brief fails to detract from the force of Appellant's arguments.

ARGUMENT

I. The prosecutor's closing argument.

In his closing argument to the jury, the prosecutor asserted that (1) a shirt Walker described as worn by one of two men who robbed him was the same shirt

Detective Butler observed during a hospital interview with Lowery on the night of the crime and (2) Lowery displayed a guilty conscience by attempting to conceal his shirt after he left the hospital. There was no evidentiary basis for these assertions.

The Government urges that the prosecutor's assertions were "within the permissible bounds of advocacy" (Gov. Br. 43) because facts in the record supported them, but even if they were not supported by facts in the record, Lowery's substantial rights were not affected because Lowery's trial counsel went outside the record in his closing argument and the Government allegedly had a strong case against Lowery.

The Government's statement that the prosecutor's remarks about Lowery's shirt rested upon "a substantial factual basis" (Gov. Br. 43) is not supported by the record. The record demonstrates that the shirt described by Walker was a different style, and may have been a different color, than the shirt described by Detective Butler (see App. Br. 16). Further, Butler's testimony that he was unable, several hours after Lowery was discharged, to find Lowery's blood-soaked shirt at the hospital where Lowery had left it (Tr. 90-91) is obviously not sufficient to support the prosecutor's

assertion that Lowery "disposed of that shirt. . . . That shirt could be used to identify him. Mr. Lowery attempted to conceal that shirt. That is guilty knowledge" (Tr. 217).

The resulting prejudice to Lowery requires reversal. Lowery's trial counsel, in his closing argument, properly invited the jury to contrast the solicitude of the park police toward Walker after his robbery with their apparent unconcern about the robbery of and brutal attack on Lowery (Tr. 222-23). In so doing and in challenging Walker's credibility, counsel mistook the location of Lowery's neck wound and made certain innocuous extra-record remarks about Brooklyn and Louisville (Tr. 222, 226).* But clearly Lowery's counsel did not thereby "so [inject] his own personal knowledge and belief into his argument as to be virtually testifying on appellant's behalf" (Gov. Br. 44). The argument that

---

* Contrary to the Government's assertion, Lowery's counsel did not compare "Walker's testimony to that of 'a con man, a forger'" (Gov. Br. 45). Rather, counsel appropriately pointed out the remarkable similarity of his client's name to the alleged surnames of Walker's traveling companions and urged that this coincidence cast doubt upon the accuracy of Walker's memory (see Tr. 226-27).

these remarks neutralized the prejudice to Lowery or somehow estopped Lowery from asserting on appeal that he was prejudiced (Gov. Br. 44-45) does not merit serious discussion.

The record demonstrates that the prosecutor relied heavily upon the asserted identity of the two shirts and the unwarranted conclusion that Lowery had a guilty conscience to persuade the jury to convict. Indeed, fully one-half of the closing argument as to Lowery was devoted to these points (Tr. 214-17). It seems disingenuous, therefore, for the Government now to state that the prosecutor's statements were "at most . . . intended to give weight to a minor portion of the Government's proof against appellant" (Gov. Br. 46).

Resting as it did upon identification of Lowery by the complaining witness, the Government's case was not particularly strong. The only other testimony which might have corroborated Walker's identification was Lowery's admitted presence in Franklin Park on the night of the robbery. But this would have been weighed against Officer McAllister's testimony that he saw Salzman with a drinking companion who was not Lowery at about 2:00

A.M. (Tr. 104-05). Moreover, the jury's questions indicated that they were uncertain whether Lowery had been attacked before, or after, Walker was robbed.

Under these circumstances, it cannot be said that the prosecutor's misstatements to the jury about the identity of the shirts and his unfounded assertion that Lowery showed guilty knowledge by attempting to conceal his shirt did not determine the guilty verdict. Lowery's conviction must therefore be reversed.

II. The answers to the jury's questions.

After deliberating for three hours, the jury returned with three critical questions about the chronology of the events on the night of the robbery: the time of the robbery of Lowery, the time Lowery was admitted to the hospital, and the time of the robbery of Walker. These were "answered" the following day by the court reporter reading from her notes. The answer given to the first question was hearsay testimony of Detective Butler, and the answer given to the third question was a portion of a leading question by the prosecutor to Walker. The judge gave no supplemental instructions. Lowery's trial counsel objected to the first answer before it was read to the jury but was overruled; he

was not given an opportunity to object to the third answer outside the jury's presence.

The Government claims that the manner in which the jury's questions were answered left the impression that the specific answers given were not established facts but evidence, because (a) the words "transcript" and "evidence" were sometimes used in explanatory remarks to the jury, and (b) the judge instructed the court reporter to read the answers from her notes. In addition, the Government claims that the hearsay testimony read in answer to the first question was properly repeated because no objection had been raised when the testimony was first given. Nothing is said about the answer given to the third question.*

There was no magic in using the words "transcript" or "evidence" when the word "answer" was as often used in the judge's explanatory remarks to the jury. Nor does the fact that the court reporter, rather than the

---

* Although Lowery's trial counsel apparently agreed out of the jury's hearing that Walker testified he had been robbed "somewhere around 1:00" (Tr. 248-49), in fact Walker had not so testified. The prosecutor's question was, "This was early on the 16th when your money was taken from you around 1:00 A.M.?" Walker's answer was, "Somewhere in that area" (Tr. 29).

judge, read the answers to the jury have any significance. Such minor details should not obscure the important facts that the specific times given in response to the first and third questions were taken out of context and highlighted for the jury without supplementary instructions at a critical point in the trial. That no objection had previously been made to Detective Butler's hearsay testimony has little, if any, relevance.* The point is that the hearsay testimony should not have been repeated and emphasized as it was in response to the jury's question about the time of the robbery of Lowery.

Lowery had been attacked near the scene of the crime and was interviewed by a police officer in a hospital about 2:00 A.M. Walker's direct testimony did not specify the time of his robbery. His recollection about the time of other events on that evening was far from precise and certain of those statements were specifically contradicted by other testimony (see App. Br. 23-24). If it appeared that Lowery had been attacked before Walker was robbed, Lowery would have had an alibi. The jury's questions

---

* Because Muns, not Lowery, was the source of the testimony repeated to the jury (Tr. 88), it should have been excluded in the first instance.

thus evidenced doubt about Walker's "positive" identification of Lowery and indicated that they believed their doubts would be resolved by the answers to their questions. The answers given, one hearsay and the other a part of a prosecutor's leading question, placed Lowery at the scene of the crime at the time when it was committed. The answers could, and probably did, determine the outcome of the jury's deliberations thirty-five minutes later.

In the recent case of Washington v. United States, 379 F.2d 166 (D.C. Cir. 1967), the crime involved was rape at about 2:00 A.M., the issue was the reliability of identification of the appellant by the victim and her escort, and the defense was alibi. In response to a message from the jury indicating "questions regarding the lighting condition in the area" in which the crime was committed, the trial judge proposed to read a weather report not previously in evidence, including the statement, "[T]he visibility was eight miles." An objection to this statement was overruled. After reading the report to the jury, the judge added: "I assume that means eight miles clear visibility." 379 F.2d at 167.

This Court reversed the appellant's conviction. Noting that "the issue on which the jury expressed some

degree of doubt went to the very heart of the case--whether the defendant was the rapist whom the witnesses saw," the Court observed, "The doubt was apparently resolved solely by consideration of evidence that, even if wholly accurate, gave only a general and peripheral description of the lighting conditions in Fairlawn Park, and gave that under circumstances making it likely that it would be taken as conclusive as to those conditions." 379 F.2d at 168 (emphasis added). The Court also pointed out that the circumstances gave defense counsel "no practical opportunity to refute the implications of the report or to set it in perspective." Ibid.

As in Washington, the response to the jury's questions in this case gave "undue emphasis to facts that should have been considered . . . only in context." Ibid. Taken out of an uncertain record without cautionary instructions, the answers given to the first and third questions made it "likely that [they] would be taken as conclusive. . . ." In the circumstances of this case, the failure of the trial judge to supply full answers to the jury's questions and to remind the jury

of their duty to determine the facts from all the evidence was equally plain error requiring reversal.

Respectfully submitted,

Franklin M. Schultz
Robert M. Kennan, Jr.

888 17th Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant
(Appointed by this Court)

Of Counsel:

Purcell & Nelson
888 17th Street, N. W.
Washington, D. C. 20006

Dated: February 5, 1968

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,172

FREDERICK L. SALZMAN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the Judgment of the United States District Court for the District of Columbia

---

E. Riley Casey
Stephen F. Owen, Jr.
Counihan, Casey & Loomis
1000 Connecticut Avenue
Washington, D. C. 20036
Counsel for Appellant
(Appointed by This Court)

INDEX AND TABLE OF CASES

SUBJECT INDEX

TABLE OF CASES CITED

I. The trial court erred in failing to distinguish between voluntary intoxication and chronic alcoholism in its instructions to the jury on specific intent.

The Government contends that whether the intoxication is "voluntary" or "involuntary", or whether the robbery was a "product" of "chronic alcoholism" are irrelevant considerations on the question of specific intent.

The Government thus attempts to neatly compartmentalize "specific intent" and separate it from troublesome considerations of criminal responsibility and involuntary intoxication. It would appear that these issues are not so easily separable.

Since the degree of intoxication which would render a person mentally incapable of entertaining, the requisite intent is unlikely to be short of that which renders him unconscious;[1] if the jury were to follow the trial judge's instructions (Tr 245) literally, it is doubtful that intoxication could ever be a defense.

The trial judge made no distinction in his instruction between voluntary intoxication and involuntary intoxication (i.e. chronic alcoholism). His reference to chronic alcoholism was prefaced with the words "Now, chronic alcoholism is not a defense to the crime of robbery charged in this indictment...." (Tr.245). The jury may well have paid little attention to

---

[1] State v Johnson, 41 Conn. 584, 586 (1874)

the condition of chronic alcoholism based on the trial judge's fleeting reference to it. It is submitted that the condition of chronic alcoholism, since it affects the transcendant issue of criminal responsibility, must be dealt with more completely and more effectively in the judge's instructions than the brief reference by the trial judge in this case.

There are those who feel that involuntary intoxication is a defense to a crime and that the recognized involuntary intoxication of the chronic alcoholic should be included within the legal definition of "involuntary" alongside fraud, duress, or innocent mistake, as a complete defense to crime whether an alcohol offense or not.

However, it must be conceded that an alcoholic is not a always intoxicated, and even when he is intoxicated, his mind is not always so overcome by drink that his knowledge and volition are impaired. Some standards must be developed which will indicate how "drunk" the alcoholic must be in order to avail himself of the chronic alcoholism defense. It is submitted that the Durham-McDonald rule can be utilized in this situation and the same basic test can be engrafted for the chronic alcoholism defense. Thus, if the defendant suffers from a chronic alcoholic condition and that condition substantially affects his mental or emotional processes such that his behavioral controls are impaired, he is not responsible for

criminal acts performed while in that condition.

Judge Burger, in his dissent, in Campbell v United States, 113 U.S. App. D.C. 260, 307 F. 2d 597 (1962) dealt succinctly with the inter-relationship of criminal intent and the Durham rule at page 278:

> More important is the fact that when we adopted the 1869 product test, without a word in the jury charge as to any connection between the product test and the matter of intent or mens rea, we broke with all legal and moral tradition.
>
> * * * * * * * * * * *
>
> Plainly the idea of mens rea is not in conflict with psychiatry, as advocates of the product concept seem to think, for like psychiatry the law of mens rea is centered not on the act but upon the actor and upon his capacity to regulate his behavior or control his conduct.

It is submitted that the concept of criminal responsibility and the concept of mens rea deal with the same thing, namely, the capacity of the actor to regulate his behavior and control his conduct. For this reason, the trial judge's instruction on specific intent was severely deficient in not covering involuntary intoxication and criminal responsibility.

II. Appellant Salzman has introduced sufficient evidence below to raise the issue of criminal responsibility and the need for an instruction to the jury concerning that issue.

The Government contends that no evidence was either proferred or introduced in the trial court concerning criminal responsibility or whether the robbery was a product of chronic alcoholism. The Government then goes on to say that this lack of evidence and the failure to offer an instruction or object to the judge's instructions precludes the raising of the issue on appeal.

Under Davis v United States, 160 U.S. 469 (1895) if there is "some evidence" supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury. In McDonald v United States, 114 U.S. App. D.C. 120, 312 F. 2d 847 (1962), this court observed:

> The subject matter being what it is, there can be no sharp quantitative or qualitative definition of 'some evidence'. Certainly it means more than a scintilla,..

Chief Judge Bazelon in a dissenting opinion on the issue of instructions regarding mental responsibility in Smith and Cunningham v United States, 122 U.S. App. D.C. 300, 353F. 2d 838 (1965) quoted with approval the following statement of the court in Tatum v United States, 88 U.S. App. D.C. 386, 391, 190 F. 2d 612, 617 (1951):

> In criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any

> foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility-

Based on the above cases, it is submitted that sufficient evidence of appellant Salzman's chronic alcoholism and its impact on him was introduced in the trial below to support consideration by the jury of the issue of criminal responsibility and whether appellant was legally responsible for the criminal robbery he has been convicted of. Appellant Salzman's testimony regarding his long series of convictions for public intoxication and his condition on the night in question (Tr. 153-172) raise a question whether his capacity to control his behavior was impaired. Mrs. Gardner testified as a clinic specialist in alcoholism (Tr. 174-180) and stated that appellant was adjudged a chronic alcoholic in August 1966 by the Court of General Sessions. Expert testimony has not as yet developed in cases of this kind involving the criminal responsibility of chronic alcoholics. This is a frontier of the law without prescribed techniques and procedures. It is noted that the decisions in Easter and Driver relied heavily on long histories of alcohol offenses as proof of illness, rather than expert testimony. Of course, as the law develops, better and more effective means will be found to present

evidence concerning a chronic alcoholic to a jury. However, at this early juncture in this area, it would appear harsh to dismiss appellant Salzman's appeal concerning criminal responsibility based in a failure to meet the "some evidence" standard.

It is submitted that the trial judge has a certain responsibility to offer instructions sua sponte dealing with crucial issues, such as criminal responsibility notwithstanding the failure of counsel to raise the issue either by offering an appropriate instruction or objecting to those given. This responsibility was adverted to by this court in Gaskins v United States, No. 20,252, D.C. Cir. December 20, 1967 at page 12 when the court stated with regard to an instruction involving the combination effect of any narcotic addiction and mental deficiency:

> Trial judge will in the future be well advised to consider such an instruction in appropriate situations whether requested or not. We affirm here because we perceive no prejudice, but in another case there quite easily could be. A proper determination of criminal responsibility is too transcendent a matter to be exposed to that sort of risk. (Emphasis Supplied)

III. Appellant does not seek to make "chronic alcoholism" an automatic defense to a crime by use of that label, but seeks to have the issue presented to a jury.

The Government generally contends in its brief that appellant seeks to make "chronic alcoholism" a label-type defense to all crimes committed after one is adjudicated a "chronic alcoholic."

It is clearly stated in appellant's brief at Page 23 that a major problem confronting the trial judge and jury is the resolution of the factual question whether a particular defendant's chronic alcoholism is the cause of the antisocial conduct for which he is being prosecuted. For this reason, jury instructions must be very carefully prepared. Appellant in its brief below (P. 25-26) proposed a two-part factual question for the jury:

> 1. Was Appellant Salzman a chronic alcoholic at the time of the alleged commission of the act of robbery by him, and if so:
>
> 2. Whether the acts he was charged with were a product of his chronic alcoholism or arose out of that state.

Earlier in this brief, it was proposed to adapt the Durham-McDonald rule of criminal responsibility for this

purpose. It is felt that this procedure would in no way be contrary to the recent decision in Washington v United States, No. 20,232, D.C. Cir., December 13, 1967, concerning the use of medical labels or previous decisions of this court in which the role of the jury in making these determinations of fact was stressed.

Conclusion

For the reasons stated above, as well as those set fourth in our opening brief, it is respectfully submitted that this case should be reversed and remanded to the District Court for a new trial.

Respectfully submitted,

February 5, 1968

E. Riley Casey
Stephen F. Owen, Jr.
1000 Connecticut Avenue,NW
Washington, D. C. 20036
Attorney for Appellant
(Appointed by this court)